TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 501

QUIN BOHANAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED JANUARY 20, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1261.

QUIN BOHANAN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Stipulation as to transcript	1	1
Petition in error	2	1
Precipe for summons in error	4	3
Transcript from District Court	4	3
Indictment	5	3
Mandate of supreme court of Nebraska	7	5
Plea of not guilty	9	6
Order for continuance	10	6
Hearing before a jury	10	7
Hearing and continuance	11	7
Verdict	12	8
Judgment	12	8
Order overruling motion for new trial	13	9
Order granting leave to file motion for change of venue	13	9
Order for change of venue	14	10
Certificate of clerk of district court of Lancaster county	14	10
Plea of *autrefois acquit*	15	10
Reply to plea in bar	20	14
Amended reply to plea of *autrefois acquit*	21	14
Demurrer to " " "	23	15

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order overruling demurrer, &c.	24	16
Plea of not guilty	25	17
Jury called, &c.	26	18
Verdict	30	21
Instructions to jury	31	22
Motion for new trial	32	22
Order overruling motion for new trial	34	24
Judgment	34	24
Transcript of district court of Lancaster county	35	25
Indictment	36	25
Hearing before a jury	38	27
Hearing and continuance	39	27
Verdict	40	28
Judgment	40	28
Order overruling motion for new trial	41	29
Clerk's certificate	41	29
Writ of error	42	29
Return on writ of error	43	30
Judgment	43	30
Opinion	44	31
Motion for rehearing	67	44
Order overruling motion for rehearing	67	44
Petition for writ of error	67	45
Order denying writ of error	68	45
Clerk's certificate	69	46
Writ of error	70	46
Acceptance of service and return on writ of error	72	47

1 *Pleas.*

In the supreme court of the State of Nebraska, at a term thereof begun and held at the capitol, commencing on the first Tuesday of July, A. D. 1885—present, Hon. Amasa Cobb, Ch. J.; Hon. Samuel Maxwell, J.; Hon. M. B. Reese, J. Attest, Guy A. Brown, clerk—the following proceedings, *inter alia*, were had and done, to wit:

Be it remembered that on the second day of August, A. D. 1884, there were filed in the clerk's office of said court a certain petition in error, transcript, and bill of exceptions, so much of which as relate to the question of former jeopardy, according to the stipulation of the parties hereto annexed, was as follows, to wit:

Stipulation.

In the Supreme Court of the State of Nebraska.

QUIN BOHANON, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

Saving and reserving to the State of Nebraska all its rights and privileges of exceptions to the jurisdiction of the Supreme Court of the United States over the question of twice in jeopardy under the Fifth Amendment to the Constitution of the United States, as presented and set forth in the accompanying transcript, it is hereby stipulated by the parties to the above-entitled action that the accompanying abstract contains all of the petition in error, transcript, and bill of exceptions filed in the supreme court of Nebraska touching the question of former jeopardy.

2 And it is further stipulated between the parties that the same may be used by either party, if desired, as a complete record of the above question of twice in jeopardy.

Dated Lincoln, Neb., November 20th, 1885.

WM. LEESE,
Attorney General of Nebraska.
O. P. MASON,
Att'y for Defendant.

Petition in Error and Precipe for Summons in Error & Supersedeas & Stay of Execution and Bill of Exceptions.

In the Supreme Court of the State of Nebraska.

QUIN BOHANON, Pl't'f in Error,
vs.
THE STATE OF NEBRASKA, Def't in Error.

Petition in error.

The plaintiff, Quin Bohanon, complains of the defendant, The State of Nebraska, and for cause thereof says that at the April, A. D. 1884, term of the district court of the second judicial district of

the State of Nebraska, held in and for the county of Otoe, said defendant recovered a judgment, by the consideration of said court, against the said plaintiff, in a certain criminal action then pending in said court, wherein the said State of Nebraska was plaintiff and the said Quin Bohanon was defendant, a copy of the record and judgment and proceedings in which case duly certified is hereto attached, marked "A," and made a part of this petition.

And the said Quin Bohanon avers that there is error in the said record and proceedings in this, to wit:

The court [erred] in refusing to give the instruction numbered ten (10) requested by this plaintiff in error, *and by the court refused.*

3 The court erred in refusing to give the following instruction requested by the defendant: "If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the State of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon which trial [he] was found guilty of murder in the second degree, and judgment was rendered against him on said finding, then as a matter of law the jury in this case cannot now find the defendant guilty of murder in the first degree."

The said verdict in said cause is against and contrary to the instructions of the court and law of the case.

The verdict and judgment is contrary to law.

The court erred in overruling the demurrer of the defendant to the State's reply to the defendant's plea in bar to murder in the first degree.

The court erred in refusing to give the 10th instruction on defen't's request, number 10 in the record, to which ruling the defendant excepted at the time.

The court erred in overruling the defendant's motion for a new trial.

That the said court erred in putting the same defendant twice in jeopardy for the same offense in violation of and disregard of article V of the amendments to the Constitution of the United States, which provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;" and the court erred in disregarding the constitution of the State of Nebraska, section 12 of the bill of rights, which provides that no person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense. The record

4 shows that said Quin Bohanon had been once acquitted of murder in the first degree.

O. P. MASON,
Att'y for Pl't'f in Error.

The document is endorsed: "2024. Quin Bohanon *v.* The State. Petition in error. Filed August 2, 1884. Guy A. Brown, clerk."

Sentence and Judgment of Death Against the Plaintiff in the Court Below.

In the Supreme Court of the State of Nebraska.

QUIN BOHANON, Plaintiff in Error,
vs.
THE STATE OF NEBRASKA, Defendant in Error.

To the clerk of the supreme court of the State of Nebraska:

Please issue summons in error in the above-entitled cause returnable according to law and notice and order under the 23 section of the bill of rights of the constitution of the State of Nebraska of supersedeas to stay the execution of the death sentence until the further order of the supreme court in the premises. The defendant is sentenced to be hanged August 8th, 1884, and is confined in Otoe county, and in custody of the sheriff of Otoe county, who is charged with the execution of said sentence.

O. P. MASON,
Att'y for Quin Bohanon, Pl'ff in Error.

[Endorsed:] Dist. court Otoe Co., Neb. Received and filed June 28, 1884. W. F. N. Houser, clerk. Gen'l No. 3021.

THE STATE OF NEBRASKA, } *ss:*
County of Otoe, }

Pleas before the district court of Otoe county, Nebraska, at a term begun and holden at Nebraska City, in said county of Otoe and State of Nebraska, on the 8th day of April, A. D. 1884, before Honorable J. H. Broady, judge of the first judicial district of the State of Nebraska, sole presiding judge at said term of said court, and who interchanged with and held said court for the
5 Honorable S. B. Pound, judge of the second judicial district of the State of Nebraska, of which district said county of Otoe is a part.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

Be it remembered that heretofore, to wit, on the 4th day of April, A. D. 1884, there was filed in the office of the clerk of the district within and for Otoe county, and State of Nebraska, an indictment found by the grand jurors of Lancaster county, Nebraska, at the February term, 1882, of the district court of said county, together with the transcript of the proceedings had and done by said district court within and for Lancaster county aforesaid under said indictment, including the order made by said court transferring said

cause from Lancaster county to this said county of Otoe for trial, the said counties of Lancaster and Otoe being adjoining counties and a part of said second judicial district, and which said indictment and transcript of the proceedings had thereunder aforesaid, and order aforesaid, are in the words and figures following, to wit:

Indictment. Filed April 4th, 1884.

Indictment.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Of the February term of the district court of the second judicial district of the State of Nebraska within and for said Lancaster county, in said State, in the year of our Lord one thousand eight hundred and eighty-two, the grand jurors chosen, selected, and
6 sworn, in and for the county of Lancaster aforesaid, in the name and by the authority of the State of Nebraska, upon their oaths, present that Quin Bohanon, otherwise called Richard B. Raven, late of the county aforesaid, on the 19th day of February, in the year of our Lord one thousand eight hundred and eighty-two, in the county of said Lancaster and State of Nebraska aforesaid, in and upon one James Cook, then and there being, did, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, make an assault, in a menacing manner, with intent him, the said James Cook, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, to kill and murder; and that the said Quin Bohanon, otherwise called Richard B. Raven, a certain pistol, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Quin Bohanon, otherwise called Richard B. Raven, then and there in his right hand had and held, then and there, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did discharge and shoot off, with the intent aforesaid; and that the said Quin Bohanon, otherwise called Richard B. Raven, with the leaden bullet aforesaid, out of the pistol aforesaid, by the force of the gunpowder aforesaid, by the said Quin Bohanon, otherwise called Richard B. Raven, then and there discharged and shot off as aforesaid, him, the said James Cook, in and upon the left side of the breast of him, the said James Cook, then and there, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did strike, penetrate, and wound, with the intent aforesaid, thereby then and there giving to him, the said James Cook, with the said leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Quin Bohanon, otherwise called Richard B. Raven, in and upon the left side of the breast of
7 him, the said James Cook, one mortal wound, of the depth of three inches and of the breadth of half an inch, of which said mortal wound he, the said James Cook, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that he, the said Quin Bohanon, otherwise called Richard B. Raven, him, the said James Cook, in the manner and by the means

aforesaid, unlawfully, feloniously, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

JOHN C. WATSON,
District Attorney.

Endorsed: Doc. A. 131. No. 170. Lancaster county district court. The State of Nebraska *vs.* Quin Bohanon, otherwise called Richard B. Raven. Indictment for murder in the first degree. A true bill. Harvey W. Hardy, foreman of the grand jury. Filed Mar. 1, 1882. A. D. Burr, clerk. Witnesses, J. E. Bragg, Ed. Shenaur, Charles Cook, C. H. Carpenter, W. M. Wilson, E. H. Warden, Dr. G. E. Bragg, Dr. A. J. Shaw, Joseph Moore. John C. Watson, district attorney. Arraigned in open court March 3d, 1882, and plead "not guilty." A. D. Burr, cl'k D. C. Withdraw plea of "not guilty" heretofore entered by leave of court, and entered plea this day of "not guilty" M'ch 15th, 1882. A. D. Burr, cl'k D. C. Dist. court Otoe Co., Neb. Received and filed Apr. 4, 1884. Gen'l No. 3021. W. N. F. Houser, clerk. Arraigned in open court April 16, 1884, and enters his plea of "not guilty." W. F. N. Houser, clerk dist court Otoe Co., Neb. Record of proceedings certified from Lancaster to dist. court. Filed April 4, 1884.

Mandate.

8 In the Supreme Court of the State of Nebraska. January Term, 1884.

THE STATE OF NEBARSKA:

To the district court of the second judicial district, sitting in and for the county of Lancaster, Greeting:

Whereas in a late action before you, wherein the State of Nebraska was plaintiff and Quin Bohanon defendant, the said plaintiff recovered a judgment against said defendant, upon a transcript of which record and proceedings in your said court the said defendant prosecuted a petition in error to the supreme court of the State of Nebraska, upon a trial of which cause in said supreme court it was considered by said court that the judgment rendered by you in favor of said plaintiff and against said defendant be reversed at the costs of said plaintiff, taxed at $10.95, and cause remanded for new trial.

Witness the Hon. Amasa Cobb, chief justice, and the seal of said court, at Lincoln, this 30 day of January, 1884.

[SEAL.] GUY A. BROWN, *Clerk.*

Endorsed: Mandate. Supreme court State of Nebraska. The State of Nebraska *vs.* Quin Bohanon. Costs supreme court, $10.95. Filed Jan. 4, 1884. E. R. Sizer, clerk D. C. J. S. Dales, deputy.

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, E. R. Sizer, clerk of the district court of the second judicial district of Nebraska in and for said county, do hereby certify that the above and foregoing is a true and correct copy of the mandate from the supreme court of the State of Nebraska reversing the judgment of the district court aforesaid in the case of the State of Nebraska *vs.* Quin Bohanon, and remanding said cause for a new trial, with all the endorsements on said mandate, as the same appears
9 from the records and files of said court in said cause, and now in my charge as clerk aforesaid.

In testimony whereof I have hereunto set my hand and the seal of said court this 4th day of April, 1884.

E. R. SIZER, [SEAL.]
Clerk D. C.

Transcript of Proceedings.

Pleas in the district court of the second judicial district of Nebraska within and for Lancaster county.

Be it remembered that at the several times hereinafter named, mentioned, and set forth, before the Honorable S. B. Pound, judge of said court, and at the respective terms thereof, heretofore, as hereinafter appears, were had and done the following proceedings in a cause in which the State of Nebraska is plaintiff, and Quin Bohanon, *alias* Richard B. Raven, is defendant, to wit:

Journal Entry.

That on the 3rd day of March, 1882, that being the 5th day of the February, A. D. 1882, term of said Lancaster county district court, were had and done the following proceeding, among others, as appears upon court journal "H," page 356, of the records of said court, to wit:

Indictment—Murder in the First Degree.

THE STATE OF NEBRASKA
vs.
——, otherwise known as RICHARD B. RAVEN. } 170, "A," 131.

Now comes the district attorney, on behalf of the State of Nebraska, and the defendant being brought into court in custody of the sheriff and arraigned upon said indictment, for plea thereto saith
10 he is not guilty, and trial set for the 14th instant, and is remanded to the custody of the sheriff.

Journal Entry.

That on the 17th day of March, 1882, that being the 17th day of February A. D. 1882, term of said court, were had and done the following proceeding herein, as appears upon court journal "H," page 429, to wit:

Indictment—Murder in 1st Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON. } 170 "A," 131.

Now comes the defendant, by counsel, and moves the court for a continuance of said cause, on the consideration whereon motion sustained and cause continued.

Journal Entry.

That on the 6th day of June, 1882 (that being the 14th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal " H," page 565, to wit:

Indictment—Murder in 1st Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, *alias* RICH'D B. RAVEN. } 170 "A," 131.

Now came the district attorney, on behalf of the State of Nebraska, and defendant being brought into court in custody of the sheriff, also came the following-named persons, jurors, to wit: John Demaree and W. L. Eldfeldt, of the regular panel, and P. H. Cooper, G. W. McKinnon, Ports Wilson, Thomas Ewing, Saper Dykstra, C. Devries, A. Luckey, J. H. Mauzy, J. H. Simmons, and W. L. Wilcox, as talesmen, who were duly empaneled and sworn according to law, and the said jury having heard the testimony adduced in part, said cause was continued until to-morrow morning at 9 o'clock.

11 *Indictment—Murder in 1st Degree.*

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, &c. } 170 "A," 131.

This day again came the district attorney and associate counsel, W. R. Kelly, Esq., and the defendant being brought into court in custody of the sheriff, also came the jury heretofore empaneled and sworn, and the trial proceeded; and the said jury having heard the remaining — of the testimony and the hour of adjournment having arrived said cause was continued until to-morrow morning at 9 o'clock. (Journal " H," page 566, June 7th, 1882, 15th day of the May, A. D. 1882, term of said court.)

Journal Entry.

That on the 8th day of June, 1882 (that being the 16th day of the May, A. D. 1882, term of said court), were had and done the — proceeding herein, as appears upon court journal " H," page 567, to wit:

Indictment—Murder in the 1st Degree.

THE STATE OF NEBRASKA
vs.
QUINN BOHANON, &C. } 170 "A," 131.

This day again came the district attorney, on behalf of the State of Nebraska, and the defendant being brought into court in the custody of the sheriff, also came the jury heretofore empaneled and sworn, and the trial proceeded; and the said jury having heard the argument of counsel and charge of the court retired to their room in charge of the sheriff for deliberation; and the hour of adjournment having arrived the court adjourned until to-morrow morning at 9 o'clock.

Journal Entry.

That on the 9th day of June, 1882 (that being the 17th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal "H," page 571, to wit:

12 *Indictment—Murder in the First Degree.*

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } 170 "A," 131.

And the said jury having heard the testimony adduced by the parties, the argument of counsel, and the charge of the court, after due deliberation thereon, returned in open court the following verdict, to wit:

THE STATE OF NEBRASKA, *Lancaster County,* } *ss:*

May Term, A. D. 1882, to wit, June 8th, 1882.

THE STATE OF NEBRASKA, Plaintiff,
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN, Defendant.

We, the jury in this case, being duly empaneled and sworn, do find and say that we find the defendant guilty of murder in the second degree, as he stands charged in the indictment, and we, the jury, recommend your honorable court to punish the prisoner to the full extent of the law.

PORTS WILSON, *Foreman.*

Journal Entry.

That on the 10th day of June, 1882 (that being the 13th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal "H," page 574, to wit:

Indictment—Murder in the First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, alias RICHARD B. RAVEN. } 170 "A," 131.

The defendant herein having heretofore been convicted of murder in the second degree was this day brought into court in custody
13 of the sheriff, and informed by the court of the verdict of the jury, and inquired of if he had anything to say why judgment should not be pronounced against him, in a very touching masterpiece standing at the bar of the court saith nothing.

It is, therefore, considered and adjudged by the court that the said Quin Bohanon, *alias* Richard B. Raven, be imprisoned and confined in the penitentiary of the State, and kept at hard labor, for the period of his natural life, and that he pay the costs of this prosecution, for which execution is awarded, to all of which the defendant excepts.

Journal Entry.

That on the 13th day of May, A. D. 1882 (that being the 20th day of the May, A. D. 1882, term of said court), were had and done the following proceeding herein, as appears upon court journal "H," page 582, to wit:

Indictment—Murder in the First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, &c. } 170 "A," 131.

Now comes the defendant, by his counsel, O. P. Mason, and moves the court to set aside the verdict, and for a new trial herein, and the court being fully advised in the premises overrules said motion, to which ruling the defendant duly excepts, and 40 days from rising of court given to reduce exceptions to writing.

Journal Entry.

That on the 29th day of February, 1884 (that being the 5th day of the February term of said court), were had and done the following proceedings herein, as appears upon court journal "J," page 222, to wit:

Mandate.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON. } 170 "A," 131.

14 Now comes the prosecuting attorney on behalf of the State of Nebraska, and the defendant, by his counsel, O. P. Mason, and the defendant, by leave of court, withdraws his plea of abate-

ment hereto filed in this cause to the indictment herein, and leave is hereby given defendant to file motion and application for a change of venue herein.

Journal Entry.

That on the 25th day of March, 1884 (that being the 26th day of the February, 1884, term of said court), were had and done the following proceeding herein, as appears upon court journal "J," page 374 of the records of said court, to wit:

Mandate.

Indictment—murder in first degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, *alias* RICHARD B. RAVEN. } 170 "A," 131.

Now comes the district attorney, on behalf of the State of Nebraska, and the defendant, by his counsel, and this cause came on to be heard on motion of defendant for change of venue herein, and it being made to appear to the court, by affidavits, that a fair and impartial trial of this case cannot be had in this county, it is ordered and directed that the venue herein be, and the same is hereby, changed to the county of Otoe, being a county adjoining Lancaster county, and ordered that the trial of the cause be had and conducted in said Otoe county at the next term of the district court to be held in and for said Otoe county.

STATE OF NEBRASKA, } *ss:*
Lancaster County, }

I, E. R. Sizer, clerk of the district court of the second judicial district of Nebraska in and for Lancaster county, do hereby certify that the above and foregoing are true and correct copies of the journal entries of all proceedings had and done in said district
15 court in a cause in which the State of Nebraska is plaintiff and Quin Bohanon, *alias* Richard B. Raven, is defendant, and that attached hereto is the original indictment filed in said court in said cause, and all as appears from the records and files of said cause in said court, and now in my charge remaining as clerk of said court aforesaid.

In testimony whereof I have hereto set my hand and the seal of said court, at Lincoln, this 4th day of April, 1884.

[SEAL.] E. R. SIZER, *Clerk D. C.*

Endorsed: The State of Nebraska *vs.* Quin Bohanon. Transcript from district court, Lancaster county, Neb., for Otoe Co. dist court. Dist. court Otoe Co., Neb. Received and filed Apr. 4, 1884. Gen'l No., 3021. W. F. N. Houser, clerk.

Defendant's Plea in Bar.

And afterwards, to wit, on the 16th day of April, 1884, the defend-

ant filed a plea of *autrefois acquit* of murder in first degree, which is in the words following, to wit:

In the District Court of Otoe County, Nebraska.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN.

On change of venue from Lancaster county, in said State.

And now comes the said defendant, Quin Bohanon, otherwise called Richard B. Raven, in his own proper person, and, having heard read the indictment against him, says that the said State of Nebraska ought not to farther prosecute the said indictment against him for the crime of murder in the first degree, because he says that heretofore, to wit, at a term of the district court within and for the county of Lancaster and State of Nebraska, of the February term thereof of the year 1882, the grand jury in and for said county, impan-
16 eled and sworn to inquire of crimes and offenses in and for said county of Lancaster, upon their oaths presented the said indictment against this defendant, which indictment was and is in the words and figures following, to wit:

Indictment.

THE STATE OF NEBRASKA, } *ss:*
Lancaster County, }

Of the February term of the district court of the second judicial district of the State of Nebraska within and for said Lancaster county, in said State, in the year of our Lord one thousand eight hundred and eighty-two, the grand jurors chosen, selected, and sworn in and for the county of Lancaster aforesaid, in the name and by the authority of the State of Nebraska, upon their oaths present that Quin Bohanon, otherwise called Richard B. Raven, late of the county aforesaid, on the 19th day of February, in the year of our Lord one thousand eight hundred and eighty-two, in the county of Lancaster and State of Nebraska aforesaid, in and upon James Cook, then and there being, did, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, make an assault in a menacing manner, with intent him, the said James Cook, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, to kill and murder, and the said Quin Bohanon, otherwise called Richard B. Raven, a certain pistol with gunpowder and one leaden bullet, which said pistol he, the said Quin Bohanon, otherwise called Richard B. Raven, then and there in his right hand had and held, then and there, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did discharge and shoot off with the intent aforesaid; and that the said Quin Bohanon, otherwise called Richard B. Raven, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder aforesaid, by the said Quin Bohanon, otherwise called Richard B. Raven, discharged and shot off as aforesaid, him, the said James

Cook, then and there unlawfully, feloniously, purposely,
17 and of deliberate and premeditated malice, did strike, penetrate, and wound, with the intent aforesaid, thereby then and there giving to him, the said James Cook, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Quin Bohanon, otherwise called Richard B. Raven, in and upon the left side of the breast of him, the said James Cook, one mortal wound of the depth of three inches and of the breadth of half an inch, of which said mortal wound he, the said James Cook, then and there instantly died, and so the jurors aforesaid, upon their oaths aforesaid, do say that the said Quin Bohanon, otherwise called Richard B. Raven, him, the said James Cook, in the manner and by the means aforesaid, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Nebraska.

JOHN C. WATSON,
District Attorney.

And there were and are on said indictment the following endorsements, to wit: Indictment. Doc. "A." 131. No. 170. Lancaster Co. dist. court. The State of Nebraska *vs.* Quin Bohanon, otherwise called Richard B. Raven. Indictment for murder in the first degree. A true bill. Harvey W. Hardy, foreman of the grand jury. Filed March 1, 1882. A. D. Burr, clerk D. C. Witnesses, J. E. Bragg, Ed. Shenaur, Charley Cook, C. H. Carpenter, Wm. Wilson, C. H. Worden, Dr. G. E. Bragg, Dr. A. J. Shaw, Joseph Moore. John C. Watson, district attorney. Arraigned in open court March 3d, A. D. 1882, and pleaded "not guilty." A. D. Burr, clerk D. C. Withdrew plea of not guilty heretofore entered by leave of court and entered plea this day of not guilty, March 15, A. D. 1882. A. D. Burr, clerk.

Which said indictment was returned into said court and
18 by the clerk thereof filed on the 1st day of March, 1882.

And this defendant further says that said indictment is the same indictment under and upon which the said State of Nebraska now seeks to prosecute him, the said Quin Bohanon, otherwise called Richard B. Raven; that after the said indictment was presented by said grand jury, and on the 3rd day of March, 1882, that being a day in the February term, 1882, of said court, this said defendant, who is the same person named in said indictment, was arraigned in open court, and said indictment having been read to him pleaded not guilty thereto, and afterwards, and on the 15th day of March, 1882, that being a day of the February term, 1882, of said court, this defendant withdrew his plea of not guilty by leave of court and pleaded not guilty to said indictment.

That afterwards, and at the May term, 1882, of the district court of said Lancaster county, this defendant was brought into said court in custody of the sheriff, and also came a jury of twelve men, who

were duly empaneled and sworn as jurors in said cause, and this defendant was put upon his trial for the crime of murder in the first degree, as charged in the said indictment, and said trial was commenced on the 6th day of June, 1882, and being a day in the May term of the district court of said Lancaster county for the year 1882, and at said term of said court said case was heard before said court and jury and the testimony and evidence on behalf of the State and this defendant was adduced and heard by said court and jury, and said jury having heard all the evidence and the instructions given by the court and the argument of counsel, as well for the State as for this defendant, retired to consider of their verdict, and afterwards, and on the 8th day of June, 1882, that being a day in the May term of said district court of said Lancaster county, the said jury in said cause returned into said court their verdict,
19 which was and is as follows:

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

May Term, A. D. 1882, to wit, June 8th, 1882.

THE STATE OF NEBRASKA, Plaintiff,

vs.

QUIN BOHANON, otherwise called RICHARD B. RAVEN, Defendant.

We, the jury in this case, being duly empaneled and sworn, do find and say that we find the defendant guilty of murder in the second degree as he stands charged in the indictment, and we, the jury, recommend your honorable court to punish the prisoner to the full extent of the law.

PORTS WILSON, *Foreman.*

That afterwards, and on the 1st day of June, 1882, that being a day in the May term, 1882, of the said district court of said Lancaster county, this defendant was again brought into said court, and, being informed of the verdict of the jury and asked if he had anything to say why judgment should not be pronounced against him, it was by the court adjudged and decreed that this defendant, Quin Bohanon, otherwise called Richard B. Raven, be imprisoned and confined in the penitentiary of the State of Nebraska and kept at hard labor for the period of his natural life, and that he pay the costs of prosecution.

And the said Quin Bohanon says that he, the said Quin Bohanon, and the said Quin Bohanon, otherwise called Richard B. Raven, so indicted and convicted, are one and the same person, and that the crime of murder in the first degree set forth and charged in the said indictment is the same offense of murder in the first degree as charged in the indictment against him and upon which the State of Nebraska now seeks to prosecute him, and the said indictment hereinbefore set forth is the same indictment upon which he, this defendant, Quin Bohanon, otherwise called Richard B. Raven, was
20 tried, as hereinbefore set forth, by the district court within and for said Lancaster county. And the said defendant,

Quin Bohanon, otherwise called Richard B. Raven, says that upon the trial of said cause against him as aforesaid, upon the indictment aforesaid, he, the said Quin Bohanon, was by the said jury, and by the verdict of said jury, acquitted and found not guilty of the crime of murder in the first degree. And this the said defendant, Quin Bohanon, otherwise called Richard B. Raven, is ready to verify, and he asks that he may be dismissed and discharged from the crime of murder in the first degree charged in said indictment.

QUIN BOHANON.

STATE OF NEBRASKA, *Lancaster County,* } *ss:*

Quin Bohanon, being first duly sworn, says he is the person and defendant named in the foregoing plea and that all the statements and averments and facts in the foregoing plea stated are true.

QUIN BOHANON.

Signed in my presence and sworn to before me this 16th day of April, 1884.

W. F. N. HOUSER, [SEAL.]
Clerk Dist. Court.

Endorsed: The State of Nebraska *vs.* Quin Bohanon, otherwise called Richard B. Raven. Plea of *autrefois acquit* of murder in the first degree. Quin Bohanon, by O. P. Mason, att'y for def't. District court, Otoe county, Nebraska. Received and filed Apr. 16, 1884. Gen'l No. 3021. W. F. N. Houser, clerk.

And afterwards, to wit, on the 16th day of April, 1884, plaintiff filed a reply to defendant's plea in bar, etc., which is in the words and figures following, to wit:

Plaintiff's Reply to Defendant's Plea in Bar. Filed April 16, 1884.

In the District Court of Otoe County, Nebraska.

21 THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN.

On change of venue from Lancaster county, in said State.

And now comes Jesse B. Strode, the district attorney, and says that the State of Nebraska ought not to be barred from the further prosecuting of said indictment, or in the further prosecution of said defendant for murder in the first degree by reason of anything in the defendant's plea alleged, because he says that on defendant's own motion, instance, and request the verdict and judgment and judgment of sentence thereon and the proceedings mentioned and set forth in defendant's plea of *autrefois acquit* of murder in the first degree were set aside and a new trial granted.

JESSE B. STRODE,
District Attorney.

STATE OF NEBRASKA, } ss:
Otoe County, }

The said district attorney deposeth and says that the facts set forth in above reply are true.

J. B. STRODE.

Subscribed in my presence and sworn to before me this 16th day of April, 1884.

H. R. WOODEHOUSE,
Notary Public.

Endorsed: State *vs.* Bohanon. Reply to def'ts plea of *autrefois acquit* murder in first degree. Jesse B. Strode, dist. att'y. District court Otoe Co., Neb. Received and filed Apr. 16, 1884. Gen'l No., 3021. W. F. N. Houser, clerk.

And afterwards, to wit, on the 16th day of April, 1884, plaintiff filed an amended reply to def'ts plea of *autrefois acquit*, which is in the words and figures following, to wit:

22 *Plaintiff's Amended Reply to Defendant's Plea in Bar. Filed April* 16, 1884.

In the District Court of Otoe County, Nebraska.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN.

Amended reply to plea in bar.

And now comes the district attorney, Jesse B. Strode, and by leave of the court makes this his amended reply to the defendant's plea of *autrefois acquit* of murder in the first degree, and says that the State of Nebraska ought not to be barred from the further prosecution of said indictment, or in further prosecuting said defendant for murder in the first degree, by reason of anything in the defendant's pleas alleged, because he says that on defendant's own motion, instance, and request the verdict and judgment and judgment of sentence thereon and the proceeding- mentioned and set forth in defendant's plea of *autrefois acquit* of murder in the first degree were set aside and a new trial granted, which said judgment was set aside and reversed by the supreme court of the State, and a new trial granted to the defendant solely because the said district court of Lancaster county had erred in overruling the said defendant's plea in abatement to the said indictment, and in refusing the said defendant a trial under the issues tendered by the said plea, and that said court in requiring the said defendant to enter his plea of not guilty to said indictment until after the defendant had had a trial under his said plea in abatement, and said court have no power to try the issue tendered by said indictment until after the issue tendered by the said defendant's plea in abatement had been so tried.

Jesse B. Strode, further replying, says that the said defendant has not been acquitted of murder in the first degree, as in his said
23 plea now on file herein alleged.

JESSE B. STRODE,
District Attorney.

THE STATE OF NEBRASKA, *Otoe County:*

The said district attorney, Jesse B. Strode, being first duly sworn, says that the facts set forth in the foregoing reply are true.

JESSE B. STRODE.

Subscribed in my presence and sworn to before me this 16th day of April, 1884.

W. F. N. HOUSER,
Clerk (Dist.) Court.

Endorsed: State *vs.* Bonahon. Amended reply to defendant's plea of *autrefois acquit.* District court Otoe county, Neb. Received and filed April 16, 1884. Gen'l No. 3021. W. F. N. Houser, clerk.

And afterwards, to wit, on the 16th day of April, 1884, a demurrer to reply by State to plea of *autrefois acquit* of murder in the first degree, filed by def't, which is in the words following:

Defendant's Demurrer to Plaintiff's Reply. Filed April 16, 1884.

In the District Court of Otoe County and the State of Nebraska.

THE STATE OF NEBRASKA, Pl't'f, *vs.* QUIN BOHANON, Def't.

Indictment for murder. On change of venue from Lancaster county.

And now comes the said Quin Bohanon and demurs to the reply of the said State of Nebraska to the plea of the said Quin Bohanon of *autrefois acquit*, heretofore filed herein, of murder in the first degree, and for cause shows to this court that said reply does not state facts sufficient to constitute a defense to said plea, or any sufficient reply in law to the said plea, of *autrefois acquit* of murder in the first degree filed by the said Quin Bohanon herein.

MASON & WHEDON,
Att'ys for Def't.

24 Endorsed: The State of Nebraska *vs.* Quin Bohanon. Demurrer to reply by State to plea of *autrefois acquit* of murder in the first degree filed by def't. Mason & Whedon, att'ys for def't. District court Otoe county, Neb. Received and filed Apr. 16, 1884. Gen'l No. 3021. W. F. N. Houser, clerk.

Journal Entry.

Leave given plaintiff to file an amended reply. Defendant's demurrer overruled. Judgment on demurrer. April 16, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 16th day of April, 1884, that being the 6th day of said term, the following proceedings were had and done, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen'l No. 3021.

And now, on this 16th day of April, 1884, comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanon, with his counsel, O. P. Mason, Esq., and leave is hereby given said plaintiff to file an amended reply instanter to said defendant's plea in bar to murder in the first degree, filed in this cause, which is accordingly done. And this cause is heard to the court on the defendant's demurrer to the plaintiff's reply to the defendant's plea in bar to murder in the first degree, and the court having listened to the argument of counsel for the respective parties hereto, and being well advised in the premises, doth overrule the said demurrer; to which ruling of the court in
25 overruling the said demurrer the said defendant then and there excepted. And the said defendant making no request to plead over to the said reply, or to otherwise raise an issue on the averments of said reply, judgment is rendered on demurrer against the said plea in bar, and the same is considered and adjudged bad and of no effect as a bar to this prosecution.

Journal Entry.

Defendant arraigned and plead "not guilty" April 16, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 16th day of said April, 1884, that being the 6th day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen'l No. 3021.

And now, on this 16 day of April, 1884, comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanon, with his counsel, O. P. Mason, Esq., and the said defendant being arraigned in open court and at the bar thereof, and the said indictment being read to him for plea thereto, says "not guilty."

Journal Entry.

Record of empaneling of jury commenced April 16, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 16th day of April, 1884, that being the 6th day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

26 *On Change of Venue from Lancaster County, Nabraska.*

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

And now on this 16th day of April, 1884, comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanon, with his counsel, O. P. Mason, Esq., assisted by Thomas B. Stevenson and J. L. Mitchel, Esqrs., and the empaneling of the jury herein is commenced. And the hour of adjournment having arrived and the panel being incomplete, by agreement of both parties to this action in open court, further proceedings in this cause are hereby adjourned to 9 o'clock a. m. to-morrow, 17, 1884. And by consent of the parties to this action in open court the persons called as jurors, and found to be competent jurors, are permitted to separate and go to their homes, the court first charging them as to their duties in the premises.

Journal Entry.

Empaneling of jury. April 17, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 17th day of April, 1884, that being the 7th day of said April term, 1884, the following proceedings were had and done in said cause, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

And now, *come* on this 17th day of April, 1884, 9 o'clock a. m., comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also
27 comes the defendant, Quin Bohanon, with his counsel, O. P. Mason, Esq., assisted by Thos. B. Stevenson and J. L. Mitch-

ell, Esqrs., and the persons heretofore selected as jurors herein also come, and the empaneling of the jury progresses. And now the hour of adjournment having arrived and the panel still being incomplete, by consent and agreement in open court by both parties to this action, further proceedings in this cause are hereby adjourned to 9 o'clock to-morrow (April 18, 1884). And by consent of both parties hereto, in open court, the persons selected as jurors herein are permitted to disperse and go to their homes, the court first instructing them as to their duty in the premises.

Journal Entry.

Jury empaneled and trial proceeds. April 18, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 18th day of April, 1884, that being the 8th day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

And on this 18th day of April, 1884, 9 o'clock a. m., comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also comes Quin Bohanon, the defendant, with his counsel, O. P. Manson, Esq., assisted by Thos. B. Stevenson and J. L. Mitchell, Esqrs., and the persons heretofore selected as jurors herein also come, except juror James Lowe, whereupon the court orders that an attachment issue for juror James Lowe, which is accordingly done, and the said James Lowe is brought into court, and on a payment of costs of attach-
28 ment is discharged by the court from said attachment, and the empaneling of a jury herein progresses, and now the panel being complete and composed of twelve good and lawful men of Otoe county *men*, to wit, William Dailey, Hiram Hunter, Walter Lloyd, H. A. Brower, C. B. Auman, O. E. French, O. H. Pike, John Martine, H. C. Ferguson, M. B. Davis, E. V. Overton, and O. D. Waterman, who are duly and legally empaneled and sworn in the oath prescribed by law, and the trial of said cause proceeds before the court and to the said jury, and the hour of adjournment having arrived and all the evidence not being in, by agreement and consent of both parties to this action, in open court, it is hereby ordered by the court that further proceedings in this action be, and the same hereby are, adjourned to 9 o'clock a. m. to-morrow (Saturday, April 19, 1884); and by agreement of both parties to this action, in open court, the said jurors are hereby permitted to retire to their respective homes, the court first charging said jurors as to their duty in the premises.

Journal Entry.

Trial proceeding to the jury. April 19, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 19th day of April, 1884, that being the 9th day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

And now on this 19th day of April, 1884, 9 o'clock a. m., comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanon, with his counsel, O. P. Mason., Esq., assisted by Thomas B. Stevenson and J. L. Mitchell, Esqrs., and also
29 come the said jury heretofore empaneled and sworn herein, to wit, William Dailey, Hiram Hunter, Walter Lloyd, H. A. Brower, C. B. Auman, O. E. French, O. H. Pike, John Martine, H. C. Ferguson, M. B. Davis, E. V. Overton, and O. D. Waterman, and the trial of this cause proceeds before the court and to the said jury. And, now, all the evidence offered by either party to this action being before the said jury, and the hour of adjournment having arrived, and the attorneys for the said plaintiff and the attorneys for the said defendant neither desiring to argue this case to the jury at this day, but consent and agree in open court to adjourn the further proceedings in this cause until 9 o'clock a. m. Monday next (April 21st, 1884), and that the said jury may be left in the care of the bailiff sworn in the case, and the court assents thereto; and it is hereby ordered by the court that the further proceedings in the cause be, and the same hereby are, adjourned to 9 o'clock a. m. Monday next (April 21st, 1884), the court first charging said jury as to their duties in the premises.

Journal Entry.

Trial and Verdict. April 21, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 21st day of April, 1884, that being the 10th day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. No. 3021.

And now, on the 21st day of April, 1884, 9 o'clock a. m., comes Jesse B. Strode, Esq., district attorney, assisted by John C. Watson and W. R. Kelly, Esqrs., on behalf of the State of Nebraska, and comes also Quin Bohanon, with his counsel, O. P. Mason, Esq., assisted by Thos. B. Stevenson and J. L. Mitchell, Esqrs., and also come the said jury heretofore empaneled and sworn in this cause, to wit, William Dailey, Hiram Hunter, Walter Lloyd, H. A. Brower, C. B. Auman, O. E. French, O. H. Pike, John Martine, H. C. Ferguson, M. B. Davis, E. V. Overton, and O. D. Waterman, and now the said jury, having heard all the evidence offered on the trial of this cause, and listened to the arguments of counsel, respectively, for the said plaintiff and for the said defendant, and having received the instructions in writing from the court, they retire to the jury-room, in charge of a sworn officer of the court, to consider of their verdict. And now, on this day, after due deliberation, the said defendant being present in court, come the said jury in open court with their verdict in writing, signed by their foreman, which verdict is in the words and figures following, to wit:

THE STATE OF NEBRASKA, } *ss*:
Otoe, }

April Term, 1884.

THE STATE OF NEBRASKA
v.
QUIN BOHANAN, otherwise called RICHARD B. RAVEN.

We, the jury in this case, being duly empaneled and sworn, do find and say that we find the defendant, Quin Bohanan, otherwise called Richard B. Raven, guilty of murder in the first degree in manner and form as he stands charged in the indictment.

(Signed) E. V. OVERTON, *Foreman.*

Whereupon, at the request of J. L. Mitchell, Esq., of counsel for the defendant, the court ordered that the jury be polled, and upon each juror being called by name and inquired of if the verdict just read was his verdict, each for himself, separately, answered "It is."

31 *Verdict of the Jury, April* 21, 1884.

THE STATE OF NEBRASKA, } ss:
Otoe County, }

April Term, A. D. 1884.

THE STATE OF NEBRASKA, Plaintiff,
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN, Defendant.

We, the jury in this case, being duly impaneled and sworn, do find and say that we find the defendant, Quin Bohanon, otherwise called Richard B. Raven, guilty of murder in the first degree in manner and form as he stands charged in the indictment.

E. V. OVERTON, *Foreman.*

Endorsed: Verdict of jury. The State of Nebraska, plaintiff, *vs.* Quin Bohanon, otherwise called Richard B. Raven, defendant. District court, Otoe county, Neb. Received and filed April 21, 1884. Gen. No. 3021. W. F. N. Houser, clerk.

And afterwards, on the 21st day of April, instructions were given to the jury by the court, the following being all of said instructions with regard to and touching the defense of the defendant of *autrefois acquit*:

Instruction numbered 11, given on the court's own motion, excepted to by defendant.

11. You should not be influenced in the least by anything which any other jury may have done.

Instruction number 10, defendant's request, refused, and exception noted by the defendant to the refusal to give this instruction.

No. 10. If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the State of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of murder in the second degree, and judgment was rendered against him upon such finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree.

32 Endorsed: State *vs.* Quin Bohanon. Instructions refused. Dist. court Otoe Co., Neb. Received and filed Apr. 21, 1884. Gen'l No. 3021. W. F. N. Houser, clerk.

And afterwards, to wit, on the 22nd day of April, 1884, a motion to set aside verdict and for a new trial was filed in the words and figures following, to wit:

The following is all of said motion as far as the same applies to and has regard to the defendant's plea in bar and defense of *autrefois acquit*:

On Change of Venue from Lancaster County.

Indictment for murder in the first degree.

In the District Court of Otoe County, in and for the Second Judicial District, in the State of Nebraska.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN.

And now comes the said defendant and moves the court for a new trial and to set aside the verdict herein, and for the following reasons, to wit:

For error of law occurring at the trial of said cause the court erred in overruling the demurrer filed by the defendant to the replication of the State of Nebraska to the defendant's plea of *autrefois-acquit* of murder in the first degree; to which said ruling of the court in overruling the said demurrer the defendant at the time excepted.

The court erred in refusing to give the instruction numbered ten (10), requested by said defendant; to which ruling of the court the defendant excepted.

The court erred in giving instruction numbered eleven (11), given on the court's own motion.

The court erred in refusing to give the following request to the
33 jury, made by the defendant: "If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the State of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon which trial was found guilty of murder in the second degree, and judgment was rendered against him on said finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree." To the refusal of the court to give said request the defendant at the time excepted.

The said verdict in said cause is against and contrary to the instructions of the court and law of the State.

The defendant having been convicted of murder in the second degree by a jury on this same charge and upon the same indictment at a former term of the district court of Lancaster county, Nebraska, such conviction was in law an acquittal on said indictment of murder in the first degree, and the court erred in refusing so to instruct the jury, and for the causes aforesaid prays the court to set aside the verdict for murder in the first degree.

O. P. MASON,
Att'y for Def't.

Endorsed: The State of Nebraska *vs.* Quin Bohanon, *alias* Richard B. Raven. Motion to set aside verdict and for new trial. Dist. court, Otoe Co., Neb. Received and filed Apr. 22, 1884. Gen'l No. 3021. W. F. N. Houser, clerk.

Journal Entry.

Defendant's motion for a new trial overruled.

And afterwards, to wit, at the April term, 1884, of said court, on the 22nd day of April, 1884, that being a day of said term, the following proceedings were had and done in said cause, as appears of record, to wit:

34 *On Change of Venue from Lancaster County, Nebraska.*

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen'l No. 3021.

And now — this 22nd day of April, 1884, comes Jesse B. Strode Esq., district attorney, on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanon, with his counsel, O. P. Mason, Esq., and this cause came on to be heard on the motion filed herein by the said defendant herein, and to grant him a new trial of this cause; upon consideration of said motion the court doth overrule the same; to which ruling of the court in overruling the said motion the said defendant then and there excepted; and for the purpose of appealing this cause to the supreme court of this State forty (40) days from rising of court are hereby allowed said defendant in which to reduce his said exceptions to writing.

Journal Entry.

Judgment on the verdict of April 22nd, 1884.

And afterwards, to wit, at the April term, 1884, of said court, on the 22nd day of April, 1884, that being the 11th day of said term, the following proceedings were had and done, as appears of record, to wit:

On Change of Venue from Lancaster County, Nebraska.

Indictment for murder in the first degree.

THE STATE OF NEBRASKA
v.
QUIN BOHANON, otherwise called RICHARD B. RAVEN. } Gen. N. 3021.

And now on this 22nd day of April, 1884, comes Jesse B. Strode, Esq., district attorney, on behalf of the State of Nebraska, and also comes the defendant, Quin Bohanan, with his counsel, and the said defendant, Quin Bohanon, standing at the bar of the court, is
35 informed by the court of the verdict of the jury herein, and is asked by the court if he had anything to say why the judgment of the court and the sentence of the law should not be passed upon him.

And the said defendant having said what he pleased, which was

no sufficient reason why judgment should not be pronounced, thereupon the court passed the following judgment and sentence:

It is therefore ordered, considered, and adjudged by the court that you, Quin Bohanon, the said defendant, be imprisoned and confined in the jail of this (Otoe) county, until the eighth day (8) of August, 1884, and that on that day you be taken by the sheriff of this (Otoe) county from such jail to the place prepared for that purpose by the said sheriff, and there, in such place, on said day, between the hours of ten (10) o'clock in the forenoon and five (5) o'clock in the afternoon by the said sheriff you be hanged by the neck until you are dead, and that you pay the costs of prosecution, taxed at the sum of seven hundred [and] twenty-six dollars and eighty-three cents ($726.83), and execution is awarded.

Transcript of District Court of Lancaster County Put in Evidence.

On the trial of said cause to the jury empaneled in the cause, as heretofore stated, on Saturday, April 19th, 1884, that being a day of the aforesaid term of the Otoe county district court, the State having rested its case in chief, and the defendant adducing testimony on his behalf—

Mason, attorney for the defendant, said: I offer in evidence the transcript of the district court of Lancaster in the case of the State against Quin Bohanon.

Kelly, associate counsel for the State objected [as] incompetent, immaterial, and irrelevant, and incomplete in that the cer-
36 tificate does not include the mandate or order of the supreme court upon the case, neither does the record state it to be introduced in the case.

Overruled & exception.

A copy of the transcript thus put in evidence on the part of the defendant here follows:

Indictment.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Of the February term of the district court of the second judicial district of the State of Nebraska, within and for said Lancaster county, in said State, in the year of our Lord one thousand eight hundred and eighty-two, the grand jurors chosen, selected, and sworn in and for the county of Lancaster aforesaid, in the name and by the authority of the State of Nebraska, upon their oaths present that Quin Bohanon, otherwise called Richard B. Raven, late of the county aforesaid, on the 19th day of February, in the year of our Lord one thousand eight hundred and eighty-two, in the county of said Lancaster and State of Nebraska aforesaid, in and upon James Cook, then and there being, did, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, make an assault in a menacing manner, with intent him, the said James Cook, unlawfully, feloniously, purposely, and of deliberate and premeditated

malice, to kill and murder, and that the said Quin Bohanon, otherwise called Richard B. Raven, a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Quin Bohanon, otherwise called Richard B. Raven, then and there in his right hand had and held, then and there unlawfully, feloniously, purposely, and of deliberate and premeditated malice did — and shoot off with the intent aforesaid, and that the said Quin Bohanon, otherwise called Richard B. Raven, with the leaden bullet aforesaid out of the
37 pistol aforesaid, by force of the gunpowder aforesaid, by the said Quin Bohanon, otherwise called Richard B. Raven, then and there discharged and shot off, as aforesaid, him, the said James Cook, and upon the left side of the breast of him, the said James Cook, then and there unlawfully, feloniously, purposely, and of deliberate and premeditated malice did strike, penetrate, and wound with the intent aforesaid, thereby then and there giving to him, the said James Cook, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Quin Bohanon, otherwise called Richard B. Raven, in and upon the left side of the breast of him, the said James Cook, one mortal wound of the depth of three inches and of the breadth of half an inch, of which said mortal wound he, the said James Cook, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Quin Bohanon, otherwise called Richard B. Raven, him, the said James Cook, in the manner and by the means aforesaid, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Nebraska.

JOHN C. WATSON,
District Attorney.

Endorsed: Indictment. Doc. "A," 131. No. 170. Lancaster Co. dist. court. The State of Nebraska *vs.* Quin Bohanon, otherwise called Richard B. Raven. Indictment for murder in the first degree. "A true bill. Harvey W. Hardy, foreman of the grand jury. Filed Mar. 1, 1882. A. D. Burr, clerk. Witnesses: J. E. Bragg, Ed. Shenaur, Chas. Cook, C. H. Carpenter, Ned Wilson, C. H. Warden, Doctor Bragg, Doctor A. J. Shaw, Joseph Moore. John C. Watson, district
38 attorney. Arraigned in open court March 3rd, 1882, and pleaded not guilty. A. D. Burr, clerk D. C. Withdrew plea of not guilty, heretofore entered, by leave of court, and entered plea this day of not guilty, March 15th, 1882. A. D. Burr, clerk D. C.

Journal Entry.

That on the 6th day of June, A. D. 1882, that being the 14th day of the May, A. D. 1882, term of said district court in and for Lancaster county, Nebraska, were had and done the following proceedings herein, as appears upon court journal "H," page 565, to wit:

Indictment—Murder in First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, *alias* RIC'D B. RAVEN. } 170 "A," 131.

Now came the district attorney, on behalf of the State of Nebraska, and the defendant being brought into court in the custody of the sheriff, also came the following-named persons as jurors, to wit: John Demaree and W. L. Elfelot, of the regular panel, and P. H. Cooper, G. W. McKinnon, Ports Wilson, Thomas Ewing, Saper Dykstra, C. Devries, A. Lucky, J. H. Mauzy, J, H. Simmons, and W. L. Wilcox, as talesmen, who were duly empaneled and sworn according to law, and the said jury having heard the testimony adduced in part said cause was continued until to-morrow morning at 9 o'clock.

Journal Entry.

That on the 7th day of June, A. D. 1882 (that being the 15th day of the May, A. D. 1882, term of said court), were had and done the following proceedings, as appear upon court journal "H," page 566, to wit:

Indictment—Murder in the First Degree.

STATE OF NEBRASKA
vs.
39 QUIN BOHANON, &c. } 170 "A," 131.

This day again came the district attorney and associate counsel, W. R. Kelly, Esq., and defendant being brought into court in custody of the sheriff, also came the jury heretofore empaneled and sworn, and the trial proceeded; and the said jury having heard the remaining testimony, and, the hour of adjournment having arrived, said cause was continued to to-morrow morning at 9 o'clock.

Journal Entry.

That on the 8th day of June, A. D. 1882 (that being the 16th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal "H," page 567, to wit:

Indictment—Murder in First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, &c. } 170 "A," 131.

This day again came the district attorney, on behalf of the State of Nebraska, and the defendant being brought into court in custody of the sheriff, also came the jury heretofore empaneled and sworn, and the trial proceeded; and the said jury having heard the argument of counsel and charge of the court retired to their room in

charge of the sheriff for deliberation, and, the hour of adjournment having arrived, the court adjourned to to-morrow morning at 9 o'clock.

Journal Entry.

That on the 9th day of June, A. D. 1882 (that being the 17th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal "H," page 571, to wit:

40 *Indictment—Murder in First Degree.*

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, otherwise called Richard B. Raven. } 170 "A," 131.

And the said jury having heard the testimony adduced by the parties and arguments of counsel and the charge of the court, after due deliberation thereon, returned in open court the following verdict, to wit:

THE STATE OF NEBRASKA, *Lancaster County,* } *ss:*

May Term, A. D. 1882, to wit, June 8th, 1882.

THE STATE OF NEBRASKA, Plaintiff,
vs.
QUIN BOHANON, otherwise called RICHARD B. RAVEN, Defendant.

We, the jury in this case, being duly empaneled and sworn, do find and say that we find the defendant guilty of murder in the second degree, as he stands charged in the indictment, and we, the jury, recommend your honorable court to punish the prisoner to the full extent of the law.

PORTS WILSON, *Foreman.*

Journal Entry.

That on the 9th day of June, A. D. 1882 (that being the 18th day of the May, A. D. 1882, term of said court), were had and done the following proceedings herein, as appears upon court journal "H," page 574, to wit:

Indictment—Murder in the First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, *alias* RICHARD B. RAVEN. } 170 "A," 131.

41 The defendant herein, having heretofore been convicted of murder in the second degree, was this day brought into court in custody of the sheriff and informed by the court of the verdict of the jury, and inquired of if he had anything to say why judgment should not be pronounced against him.

In a very touching masterpiece, standing at the bar of the court, — saith nothing.

It is therefore considered and adjudged by the court that the said defendant, Quin Bohanon, *alias* Richard B. Raven, be imprisoned and confined in the penitentiary of this State and kept at hard labor for the period of his natural life, and that he pay the costs of this prosecution, for which execution is awarded.

To all of which the defendant excepts.

Journal Entry.

That on the 13th day of June, A. D. 1882, (that being the 20th day of the May, A. D. [1882] term, of said court,) were had and done the following proceedings herein, as appears upon court journal "H," page 582, to wit:

Indictment—Murder in the First Degree.

THE STATE OF NEBRASKA
vs.
QUIN BOHANON, &c. } 170 "A," 131.

Now comes the defendant, by his counsel, O. P. Mason, and moves the court to set aside the verdict and for a new trial herein, and the court, being fully advised in the premises, overruled said motion; to which ruling the defendant duly excepts, and 40 days from the rising of the court given to reduce exceptions to writing.

STATE OF NEBRASKA, } *ss:*
Lancaster County,

I, E. R. Sizer, clerk of the district court of the second ju-
42 dicial district of Nebraska in and for said county, do hereby certify that the above and foregoing are true copies of the indictment, with all endorsements thereon, and of the journal entries of proceedings upon the trial and the sentence, all in the case of the State of Nebraska *vs.* Quin Bohanon, *alias* Richard B. Raven, in said court, as the same appears from the records of said court and now in my charge remaining as such clerk.

In testimony whereof I have hereunto set my hand and the seal of said court this 12th day of April, A. D. 1884.

[Seal District Court of Lancaster County.]

E. R. SIZER,
Clerk D. C.

And thereupon, to wit, August 2, 1884, there issued out of said court a certain writ of error, in the words and figures following, to wit:

The State of Nebraska to the district court of the second judicial district within and for the county of Otoe, Greeting:

Whereas it is alleged that in the record and proceedings and also in the rendition of judgment in a certain action of indictment which

was lately in our said court before you, wherein the State of Nebraska was plaintiff and Quin Bohanon (*alias* Richard B. Raven), defendant, error has intervened to the damage of the said Bohanon, and we, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if final judgment be given thereupon, then, without delay, you do distinctly and openly, under the seal of your court, annex to and return herewith an authenticated transcript of all judgments of your court in said action, and also all things touching the same, to our supreme court, at the city of Lincoln, so that, the same being inspected, we may cause further to be done what of right and according to the laws of the land ought thereupon to be done.

43 Witness Hon. Amasa Cobb, chief justice of our said supreme court, and the seal thereof hereto affixed, this 2nd day of August, A. D. 1884.

GUY A. BROWN, *Clerk.* [SEAL.]

Which said writ of error was returned into said court and filed in said clerk's office on the 9th day of August, 1884, endorsed as follows:

THE STATE OF NEBRASKA, } ss:
County of Otoe, }

I, W. F. N. Houser, clerk of the district court within and for Otoe county and State of Nebraska, do hereby certify that this writ was received on the 4th day of August, 1884, and I, having done as therein commanded, return the same to the clerk of the supreme court of the State of Nebraska, at Lincoln, Nebraska.

Given under my hand and the seal of said court at Nebraska City, in said county of Otoe and State of Nebraska, this 7th day of August, A. D. 1884.

W. F. N. HOUSER, [SEAL.]
Clerk of the District Court in and for Otoe County, State of Nebraska.

[Endorsed:] Supreme court State of Nebraska. 2024. Quin Bohanon *v.* The State. Writ of error returned and filed August 9, 1884. Guy A. Brown, clerk.

And afterwards, to wit, September 3, 1835, the following judgment and order was rendered by the court in said action and entered of record, to wit:

Judgment and Order.

Error from the District Court of Otoe County.

QUIN BOHANON, Plaintiff in Error,
v.
THE STATE OF NEBRASKA, Defendant in Error. } No. 2024.

44 This cause came on to be heard [and] was taken up and argued by counsel, on consideration whereof the court finds there is no error apparent on the record in said proceedings and judgment.

It is therefore considered by the court that the said judgment should be, and the same hereby is, affirmed, and that the defendant recover of the plaintiff its costs, taxed at $——, and that a special mandate issue accordingly. It is further ordered that Friday, January 15, A. D. 1886, be, and the same hereby is, appointed as the day for carrying the sentence of the district court for Otoe into execution, and that the sheriff of said county be, and he hereby is, commanded to carry into effect the aforesaid sentence on the said January 15, 1886.

And afterwards, to wit, September 3, 1885, there was filed in said clerk's office a certain opinion, which said opinion was in the words and figures following, to wit:

Opinion.

QUIN BOHANON, Plaintiff in Error,
v.
THE STATE OF NEBRASKA, Defendant in Error.

Reese, J.

The plaintiff in error was indicted by the grand jury of the February term, 1882, of the district court of Lancaster county. There was but one count in the indictment. The crime charged was murder in the first degree. A trial was had at the following (May) term of court, which resulted in a conviction of murder in the second degree. Plaintiff in error then brought the cause into the supreme court, where the judgment of the district court was reversed, and a new trial ordered. (See Bohanon *v.* State, 15 Neb., 209; 45 S. C., 18; N. W. Rep., 129.) A change of venue was then taken, by which the place of trial was removed from Lancaster county to Otoe county. On the second trial the jury found him guilty of murder in the first degree. A motion for a new trial was made and overruled, and the court imposed upon him the penalty of death. He now prosecutes error in this court.

Prior to the commencement of the last trial the plaintiff in error filed in the district court a plea of former acquittal of the charge of murder in the first degree. This plea contained a recital of the facts of the previous trial on the same indictments and the conviction thereon of murder in the second degree, and his sentence to the penitentiary for life. To this plea the State made answer alleging that the plea ought not to be sustained for the reason that on defendant's own motion the verdict and judgment were set aside and a new trial granted. Plaintiff in error demurred to this answer. The demurrer was overruled. The plea was held bad, and the first trial held not a bar to the prosecution for murder in the first degree, as charged in the indictment. During the progress of the trial plaintiff in error requested the court to instruct the jury as follows:

"(10.) If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the State of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of

murder in the second degree, and judgment was rendered against him upon such finding, then as a matter of law in this case the jury cannot find the defendant guilty of murder in the first degree."

The court refused to give this instruction, but instructed the jury as follows:

46 "(11.) You should not be influenced in the least by anything that any other jury may have done."

To the refusal to give the first above-quoted instruction and to the giving of the second plaintiff in error excepted.

By the foregoing it will be seen that the question here presented is whether or not the verdict of the jury on the first trial, finding plaintiff in error guilty of murder in the second degree, is such an acquittal of the crime of murder in the first degree as would protect and shield plaintiff in error from the danger of a conviction of the higher crime on the second trial, the verdict and judgment having been set aside upon his own motion and request. The question here presented is a new one in this State, and is one of great importance. The question is not new in the sense of its never having been decided in other States, but, unfortunately, the decisions of courts of last resort in other States upon the question here presented have not been uniform. The doctrine contended for by plaintiff in error has, to a greater or less extent, been declared by the supreme courts of Virginia, California, Tennessee, Illinois, Michigan, Iowa, Mississippi, Wisconsin, Indiana, Alabama, Texas, Missouri, and Arkansas. It is not deemed necessary to notice the decisions of all those States, as some of them are simply *dicta*, and some are in cases dissimilar to the one at bar, but we will notice the reasoning in what we deem the leading cases upon the subject.

In People *v.* Gilmore, 4 Cal., 376, the accused was indicted for murder. Upon trial the jury rendered a verdict of guilty of manslaughter, which was set aside on the prisoner's motion, and a new trial ordered. On the second arraignment he pleaded a former acquittal. Chief Justice Murray in writing the opinion of the court, which at that time (1854) consisted of himself and Mr. Justice
47 Haydenfeldt, argues the question at some length and with ability, but to the mind of the writer his deductions are not conclusive. From the opinion I quote as his first proposition as follows:

"A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must, by legal operation, amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guiity. The reason is obvious. If such were not the case the party, after undergoing punishment for manslaughter, might be arraigned and tried again for murder, notwithstanding he had been compelled to answer to the charge upon the first trial and the jury had passed upon the same."

This is undoubtedly correct so long as the verdict of the jury is

allowed to stand. It must be conceded that until the accused himself procures the cancellation of the verdict the judgment must be complete protection against other prosecutions for the same crime. So also would be a verdict of not guilty. But where the prisoner upon his own motion procures a verdict to be set aside the rule should be otherwise. In support of his conclusion the learned writer cites Hurt *v.* State, 25 Miss., 378, and quotes as follows: "The jury in such a case, in contemplation of law, render two verdicts, the one acquitting him of the higher crime, the other convicting him of the inferior." * * *

It is quite difficult for us to adopt this proposition. The verdict in such case must be an entirety. The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty it is the next duty of the jury to ascertain the magnitude of this guilt. When that is done the verdict of guilty is returned, with a finding as to the grade of that guilt. At the time this decision was made the criminal code of California con-
48 tained the following section:

"A new trial is a re-examination of the issue in the same court before another jury after verdict has been given. It places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict cannot be used or referred to either in evidence or argument."

This section was not deemed sufficient to justify the court in putting the prisoner upon his trial for murder, but the court combats the power of the legislature to enact such a law by the following:

"The constitution of the State has provided that 'no person shall be subject to be twice put in jeopardy for the same offense.' Now, if I am right that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be retried for murder in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the constitution."

Thus the learned judge, in the discussion of the case, goes beyond the rulings of the other courts.

The supreme courts of Kansas, Indiana, Kentucky, North Carolina, and others have not hesitated to follow such laws and apply the principle to capital cases; and in California, in a recent decision, the supreme court has, in the mind of the writer, fully overruled the holding in People *v.* Gilmore. In People *v.* Keefer, 3 Pac. Rep., 818, it is held that "on a plea of former conviction under an indictment for murder the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a retrial."

It is insisted that this decision was made under a provision of the statute enacted in 1874, which is as follows:

"The granting of a new trial places the parties in the same
49 position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment."

It will be observed that in essence this section does not vary materially from the one in force at the time of the decision in People *v.* Gilmore. It can do little more than to place the parties in the same position "as if no trial had been had," as provided in the first act. But it is worthy of notice that the careful examination of the opinion in People *v.* Keefer fails to disclose any reference to the act of 1874. The decision of a unanimous court is based entirely upon another section of the criminal code, which was passed in 1856, which divided the crime of murder into two degrees, the first and second. The second, as amended April 19, 1856, is as follows:

"Malice shall be implied when no considerable provocation or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree, and the jury before whom any person indicted for murder shall be tried, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime, and give sentence accordingly. Every
50 person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the State prison for a term of years not less than ten years, and which may extend to life."

The court, in the opinion by Judge McKinstry, uses the following language:

"The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees the legislature recognizes the fact that some murders [are] comprehended within the same general definition, and are of less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine in a particular case whether the crime deserved the extreme penalty of the law or a less severe punishment. (People *v.* Hun., 44 Cal., 98; People *v.* Doyell, 48 Cal., 94.) After the act of 1856, which divided the crime into murder of the first and second degrees, murder remained, and it still remains, the unlawful killing of a human being with malice afore-

thought. (Penal Code, 187, 188.) The malice may be express or implied, the express intent to kill or to commit one of the named felonies may be affirmatively established, or the killing being proved the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify, be found guilty of murder of the first degree."

51 It will be observed that the provisions of the amended act of 1856 are very similar to the provisions of sections 3, 4, and 489 of the criminal code of Nebraska, except that murder in the first degree is not specifically described. The sections above referred to are as follows:

"SEC. 3. If any person shall purposely and of deliberate and premeditated malice, or in the pepetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kill another, or if any person, by wilful and corrupt perjury, or by subordination of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death.

"SEC. 4. If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and, on conviction thereof, shall be imprisoned in the penitentiary not less than ten years or during life, in the discretion of the court.

"SEC. 489. That in all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree or manslaughter, and, if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court to determine the degree of the crime, and shall pronounce the sentence accordingly."

By section 19 of the act of California, passed in 1850, and which, so far as we are able to ascertain, still remains upon the statute books of that State, murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied * * *."

52 In Baldwin *v.* State, 12 Neb., 61, the then chief justice, Maxwell, in delivering the opinion of the court, in referring to the indictment which charged in separate counts the crime of murder in the first degree, says: "There is but one offense charged in the indictment in this case, viz, the unlawful killing of Allen J. Yokum." If, therefore, there is but one offense charged in the indictment in the case at bar, the unlawful killing of James Cook, it would seem that the adjudications of the State of California

may well be said to sustain the action of the trial court in convicting the plaintiff in error upon his trial for murder in the first degree.

In People v. Haun, 44 Cal., 96, the supreme court, by Judge Belcher, in speaking of the division of the crime of murder into two degrees, says: "In making this division the legislature recognized the fact that some murders, comprehended within the general definition, are of a less cruel and aggravated character than others, and therefore deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it is accordingly provided that murders of the second degree should be punished by terms of imprisonment depending for their length upon the circumstances of each particular case. In all this, however, the legislature did not intend to say that murder of the second degree should be anything less or other than murder. It did not indeed attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character, deserving a less severe punishment."

The same doctrine is held in People v. Foren, 25 Cal., 361. In Brennan v. People, 15 Ill., 511, and in Barnett v. People, 54 Cal., 325, the supreme court of that State have held that a defendant cannot upon a second trial be tried for a degree above that
53 for which he was convicted upon the first.

In Barnett v. The People, the court simply follows Brennan v. People without argument or criticism.

The decision in the latter case is based upon the cases of Slaughter v. State, 6 Hump., 410; Morris v. State, 8 Smedes & M., 762, and Hurt v. State, 25 Miss., 378.

In Slaughter v. State the plaintiff in error was indicted for murder in the first degree, and upon trial was found not guilty of murder, as charged in the bill of indictment, but they "find him guilty of voluntary manslaughter in manner and form as charged in the indictment." On his motion a new trial was granted. At a subsequent term he filed a plea of former acquittal, setting out the proceedings and verdict of the jury. He contended that he was entitled to discharge, and that he could not be tried for any crime under that indictment. The trial court held otherwise and put him upon trial for manslaughter. Error was taken to the supreme court, and it was held that the trial court decided correctly. The question as to whether the plaintiff in error could have been convicted of a higher crime than manslaughter was in no sense before the court. Yet it is said that if he had been tried for murder it would have been erroneous. It is quite probable that the finding of "not guilty of murder" by the verdict would make no difference as to the power of the court to put the accused upon his trial on the whole indictment; yet the court refers to it as a verdict of acquittal.

Morris v. State, 8 Smedes & M., 762, was a case where the defendant was put upon trial under an indictment containing four counts:

(1.) With the forgery of a bank-note of the Bank of the State of North Carolina.

(2.) With uttering and publishing as true a forged bank-note of the State of North Carolina.

(3.) With having in his possession certain forged bank-
54 notes of the Bank of the State of North Carolina, with the intent to utter the same.

The fourth was similar to the third.

The verdict of the jury was "guilty as charged in the second, third, and fourth counts." The verdict was objected [to] as imperfect because there was no express finding upon the first count. The cause was taken to the supreme court (Mississippi), where the verdict was held good; but the cause was reversed for error occurring in the introduction of testimony. The judgment of reversal provided that the new trial should be confined to the second, third, and fourth counts, the plaintiff in error having been acquitted upon the first count. It will thus be seen that the question in the case at bar was not before the court for two reasons: First, the question did not arise in the case; second, each count in the indictment was for a separate and distinct offense, and not for different grades or degrees of the same offense.

The case of Hurt *v.* State, 25 Miss., 378, was one in which the plaintiff in error had been indicted for murder. He filed certain pleas in abatement, alleging illegal organization of the grand jury which found the indictment. These pleas were overruled by the court and he was put upon trial, which resulted in a verdict of guilty of manslaughter in the third degree. His motion for a new trial being overruled, he alleged error in the supreme court, and a new trial was granted upon the ground that the plea in abatement should have been sustained. The judgment of the trial court was produced, the court holding that its judgment of reversal should extend no farther than to relieve him as against the verdict against him (manslaughter). As a new indictment would have to be found, and as a prosecution for the crime of manslaughter was barred by the statute of limitations, the prisoner was, upon his motion, discharged. The reasoning of the court in this case seems to be based upon the acknowledged and conceded fact that if a party charged with murder
55 and convicted of manslaughter seeks no relief from the judgment of conviction, but allows it to stand unreversed and in full force, he cannot, after having served his term of imprisonment, be again prosecuted for murder. This is most certainly true. If the judgment stands unimpeached it is the final judgment of the case, and, of course, will stand as a protection to the party convicted. From this the court concludes that the other proposition must follow, viz: that if the jury convicts of a lower grade of the same crime that conviction is necessarily an acquittal of the higher grade, and that acquittal must stand for all time, notwithstanding the verdict and judgment of conviction may be set aside; that the jury, in contemplation of law, renders two verdicts, one acquitting of the higher crime and the other convicting him of the lower, and the verdict is not an entirety.

Upon this theory we think that case, as well as Brennan *v.* People, rests. And, indeed, the same may be said of State *v.* Martin, 30 Wis., 215; State *v.* Belden, 33 Wis., 120; Jones *v.* State, 13 Tex., 184. These latter cases are exhaustive and well written, and were it not that they all seem to be founded upon what seems to us to be a false basis we could well follow them.

The case of Johnson *v.* State, 29 Ark., 31, — is a full digest of all the cases so holding and adopting the same reason, holds with them. It is beyond the comprehension of the writer to say that the character of an act may be finally and forever decided upon and adjudicated while the fact of the act itself is left untouched. Thus, a person is indicted for murder in the first degree under the laws of Nebraska. Upon trial he is found guilty of murder in the second degree. So long as that verdict and the judgment stand unreversed there is an adjudication that the act or crime was committed, and also
56 fixing the character or quality of the act. Now, it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted. There is no adjudication that any person has been killed nor that any crime has been committed. But it is said there is an adjudication that if the deceased was killed by the prisoner it was not done of deliberate and premeditated malice. It is contended that such a verdict is severable; that there are, in contemplation of law, two verdicts—one of guilty of murder in the second degree, which has been set aside, and one of not guilty of murder in the second degree, which, by virtue of the constitutional provisions in the Federal and State constitutions, must stand. This theory is also built upon what is considered the difference between an adjudication and having been once in jeopardy. It is true that this distinction does exist to some extent; but yet, if the first verdict is worth anything to a prisoner, it must be upon the theory that he has been acquitted, in so far as the criminal quality of the act of killing is concerned, but no farther.

In Hurley *v.* State, 6 Ohio, 400, it is decided that the simple verdict of a jury is not a sufficient acquittal to entitle a defendant to its protection, but that, to be of any force, there must be a judgment on the verdict, citing 2 Hale, P. C., 243.

By the statute of this State a new trial after verdict of conviction may be granted on the application of the defendant for certain reasons which are set out in the act. See section 490, Criminal Code. A new trial is defined to be a re-examination of an issue of fact. (Bouv. Law Dic.) It is a retrial of the facts of the case. In Zaleski *v.* Clark, 45 Conn., 401, Judge Loomis, in writing the opinion of the court, says: "It is believed that it always has been used in the sense of a complete retrial of the cause, except in certain instances
57 mentioned by him. What else can a retrial be than a re-examination of the facts in the same case? The principal case in which it has been held, in the absence of a statute to that effect, that a defendant can be retried upon the whole indictment, is State *v.* Behimer, 20 Ohio St., 572. In fact the supreme court of Ohio have uniformly so held.

In Hurley *v.* State, *supra*, it is decided that "a verdict in either a civil or criminal case must be considered an entire thing."

In Lesslie *v.* State, 18 Ohio, 390, the plaintiff in error was indicted for murder in the first degree. The indictment contained three counts, but each alleging and charging the same offense in the same degree. On the first trial he was found "guilty of murder in the first degree, as charged in the first count of the indictment." Upon his motion a new trial was granted, and upon the second trial he was found "guilty of manslaughter, as charged in the third count of the indictment, and not guilty as charged in the first and second counts of said indictment." Lesslie then moved the court to discharge him, for the reason that on the first trial he was found guilty of murder in the first degree, as charged in the first count of the indictment, and not guilty as charged in the second and third counts, and that upon the second trial he was found not guilty upon the first and second counts of the indictment and guilty of manslaughter upon the third count, and that the verdict of manslaughter was irregular, illegal, and void. The motion was overruled He was sentenced to the penitentiary, and took error to the supreme court. The conviction was affirmed. In discussing the question of the entirety of the verdict, Judge White, who wrote the opinion, says: "Where the indictment, though consisting of several counts, is founded upon a single transaction, the verdict is a unit and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts and of not guilty on the others is followed by the same legal consequences as a verdict of guilty upon all the
58 counts, and when in either case the verdict is set aside and a new trial granted on the defendant's motion the case is reopened for a retrial upon the counts upon which he was acquitted as well as those upon which he was convicted."

But where the several counts of an indictment are for separate, distinct offenses, the rule would of course be different, and it was so held in the case under consideration. The court say further: "We think the principle contended for properly applies where there is a conviction and an acquittal on different counts for separate and distinct offenses, or where part of the defendants are acquitted and part convicted of the same offense; but where all the counts are for the same offense and are raised merely to meet the proof, it has no just application." The ruling in this case was followed by Jarvis *v.* State, 19 Ohio St., 585.

In the case of State *v.* Behimer, *supra*, Judge White, in writing the opinion of the court, thus states the question for decision: "The question for decision, therefore, is whether the legal effect of granting a new trial was to set aside the whole verdict and leave the case for retrial upon the same issues on which it was first tried, or whether the retrial was properly limited by the court to the degree of homicide of which the defendant had been found guilty," and to the inferior degree of manslaughter." The question is discussed at considerable length, and with a good degree of logic and reason, and it was finally held that the defendant in the prosecution could be put upon a second trial upon the whole of the indictment, the

same as though there had been no previous trial and verdict. In the course of the opinion the learned judge makes use of the following language: "But the effect of setting aside the verdict, finding the defendant guilty, was to leave at issue and undetermined the fact of the homicide; also the fact whether the de-
59 fendant committed it, if one was committed. The legal presumption on his plea of not guilty was of innocence, and the burden was on the State to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree after the rest of it had been set aside would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that if the defendant committed the homicide he did it without deliberate and premeditated malice. There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or, rather, of which, under his plea, he is in law presumed to be innocent." Upon the question of the entirety of the verdict it is said: "But upon mature consideration we are of the opinion that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct offenses, or where there are several defendants, but that where there is but one defendant, and in fact but one offense, the verdict is entire. The cause was taken to the supreme court upon the exception of the State's attorney, and the decision could in no way affect the rights of the defendant in the prosecution, but the rule of law was stated by the court as follows: "Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial."
60 It must be conceded that in point of numbers this decision seems to be against the weight of authority, but it is apparently founded upon reason and upon the advanced idea of American jurisprudence. That it is just, it seems to us, cannot be questioned. That it is necessary for the protection of the law-abiding citizen is equally clear; and the fact that many of the States have incorporated a provision to that effect in their criminal laws gives weight and force to the statement. This decision was made in the year 1870. The criminal law of the State of Ohio was adopted by the Legislature of this State in 1873, almost bodily, and by the one act entitled "An act to establish a criminal code," passed March 4 of that year. By it the entire criminal law of that State was substantially transferred to the statute books of Nebraska, and in which was the law governing new trials.

In Franklin *v.* Kelly, 2 Neb., 104, [the] chief justice, in writing the opinion of the court, says: "The rule is well settled that when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed," citing a number of cases, in addition to which we cite 2 Bish., Crim. Law, sec. 900, and note from Com. *v.* Hartnett, 3 Gray, 450.

While it may be true that the Ohio decisions cannot with strictness be said to be a construction of any statute, yet they are a construction of that part of the criminal code which gives to the courts of the State the power to grant new trials, and therefore of the legal status of the person to whom the new trial has been awarded. To that extent, at least, it is proper to consult those adjudications as affecting the criminal code at the time of its adoption by this State.

But the Ohio cases are not without precedent. In U. S. *v.*
61 Harding, 1 Wall. Jr., 127, in the circuit court of the United States for the eastern district of Pennsylvania, Harding was found guilty of "murder" and Grimes and Williams "of manslaughter." Soon after the first trial Judge Baldwin, the circuit judge, died. A motion for a new trial was made before and argued to Judge Randall, the district judge, but before passing upon the motion he died. New judges were appointed, and upon their qualification the cause came on for decision. The order of the court was that a new trial be granted to Harding, and that as to Grimes and Williams the case be continued for one week, at the expiration of which they were to elect whether they would take a new trial or abide their former conviction.

Judge Grier then addressed Grimes and Williams:

"William Grimes and John Williams, you ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of a higher grade of offense charged against you in this indictment, the penalty affixed to which is death, but you have been convicted of the minor offense of manslaughter. Your lives have been in jeopardy, and you have escaped. The Constitution of your country declares that 'no person shall be twice put in jeopardy of life or limb for the same offense.' This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial except at your election and request. We believe that you have the right to waive the protection thrown around you by the Constitution for the sake of obtaining what may seem to you a greater good, but let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run
62 this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you. Before we enter of record an order for a new trial as to you we will give you one week to ponder carefully upon this subject, and consult with your counsel as to what will be your safest and best course."

In State *v.* Commissioners, 3 Hill (S. C.), 239, the defendants were indicted in two counts for obstructing a public street. The trial re-

sulted in a verdict of guilty as charged in one count of the indictment, nothing being said as to the other. A new trial was granted on the motion of the defendants. It was held that the next trial must be upon both counts of the indictment. In the opinion Butler, J., says: "If the verdict of guilty had remained it would have protected them, perhaps, against another indictment for the same offense. As long as verdict of guilty remained on the record there was a finding; but what proceeding is there on it? I consider all the proceedings on the indictment since the finding by the grand jury to be set aside at the instance and for the benefit of defendant."

As before stated the States of Kansas, California, Indiana, and Kentucky have all held to the same doctrine. See State *v.* McCord, 8 Kan., 232; People *v.* Keefer, *supra;* Veith *v.* State, 60 Ind., 291; Com. *v.* Arnold, 6 Crim. Law. Mag. (Ky.)

But it is claimed by plaintiff in error that these decisions were made by virtue of the statutes of those States, which provide, in substance, that when a new trial is granted the parties shall be in the same position as if no trial had been had; some also providing that the first trial and verdict shall not be referred to on
63 the second trial, nor shall the first verdict be pleaded in bar of a conviction on the second trial, either in the evidence or argument. It is true the decisions referred to have, in some instances, been predicated upon the statutes referred to, and did a similar statute exist in this State much of the trouble in this case would be obviated. But it may also be observed that if the clause in the bill of rights, in both the Federal and State constitutions, that a defendant shall not be twice put in jeopardy of life or limb for the same offense, is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the States cannot override or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions. While many courts, holding to the doctrine contended for by plaintiff in error, have based their argument to some extent upon these constitutional provisions, we know of none holding the statutes authorizing a second trial upon the whole indictment void.

Again: Should we adopt the reasoning of the court in People *v.* Gilmore, *supra*, in holding that the statute meant only that the parties should be in the same position with reference to the indicted issues in the case, then the force of the statutes, as a basis for the decisions referred to, is swept away, and the courts of those States may, in effect, be ranked with those so holding without the aid of a statute. With that view of the law it might well be held, as in the case last referred to, that the statute gave no authority for the decision.

So far as the provision of the Constitution of the United States may be invoked, we take it as pretty well settled now that that provision governs the court, existing by virtue of the laws of the United States, and has no application to the State courts. U. S. *v.*
64 Keen, 1 McLean, 438; Barren *v.* Baltimore, 7 Pet., 243; Twitchell *v.* Com., 7 Wall., 321; State *v.* Wells, 47 Iowa, 662; Fox *v.* Ohio, 5 How. (46 U. S.), 410.

We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree, the granting of a new trial having the effect of setting aside all the results of the former trial.

It is next contended that the court erred in overruling the challenge of plaintiff in error to a juror, J. W. B. McAllister, for cause. The examination of this juror was quite extended by counsel on both sides as well as by the court, and it could serve no good purpose to transfer it to this already lengthy opinion. It is sufficient to say that if the juror had formed an opinion as to the guilt or innocence of plaintiff in error it was solely upon reading newspaper reports published at the time of the homicide, of the truth or falsity of which he had no opinion and upon which he seemed to base whatever opinions he had, if any existed. The opinion of the juror was clearly a hypothetical one and could in no way disqualify him. Curry *v.* State, 5 Neb., 415; Murphy *v.* State, 15 Neb., 385; S. C., 19; N. W. Rep., 489. The examination made it clear and the juror did not desire to sit in the case, and would have been pleased if excused. Yet his answers were doubtless conscientiously given. During the examination by the court he was asked if, notwithstanding what he had heard and read, he could sit as a fair and impartial juror and render a verdict according to the law and evidence. His answer was, "I shall have to answer as I did Judge Mason; I don't know enough to swear I could not." The court: "I ask you if, sitting as a juror in this case, you could render a verdict according to the law and evidence as it shall be given you on the trial of the case? "Answer. Well, sir, I guess that I could; I don't know. I am very sorry I have been brought into this case in some way. I am sorry I am troubled in this way. At the same time I would not like to have to reply — swear; I don't know enough to say; I can't tell. The newspapers." The court: "How?" A. "I don't know anything further, except what I read, and I didn't form an opinion as I know as to whether they were right. We take the Omaha Herald and Lincoln papers and local paper, and I don't know whether they were right or wrong; that's as far as I can tell you." * * * The court: "You have no impression as to whether he is guilty or not of the crime?" A. "Yes; necessarily some impression, or it would not have been in the newspaper." The court: "You have an impression a man was killed?" A. "Yes; I have an impression a man was killed." The court: "You have an impression a man killed him?" A. "Yes." The court: "Whether or not it was excusable you have no impression?" A. "No." The court: "Then it would not take evidence to remove that?" A. "No; it would not."

While the examination of the juror was at times not very clear, yet on the whole examination he showed himself to be a competent juror, and the court did not err in retaining him.

The next and last error complained of is the alleged misconduct of counsel for the State while making the closing argument. This alleged misconduct consists in going outside the record, and referring to the Cincinnati riots which had occurred a few days before the trial. The record discloses the fact that counsel for plaintiff in

error had to some extent gone outside the evidence in his very able argument to the jury, and that the allusion to the Cincinnati riots by the State's counsel was in reply to what had been previously said, and for the purpose, as stated, of illustration. While counsel for the State especially should at all times avoid going outside of the record, and while in a case of this importance especially we
66 should be in favor of a strict enforcement of the proper rule governing arguments to juries, yet it is impossible for us, in the light of the almost uniform decisions of this court, to say that *while* the court erred in the matter referred to. We are informed by the record that during the argument of Mr. Watson, when he referred to the Cincinnati riots, the attorney for plaintiff in error said: "I desire to object to the discussion of the Cincinnati riots." Watson: "I simply refer to it in illustration; I heard counsel state worse." The court: "It is not——" Mason: "Note an exception." There was no ruling of the district court adverse to plaintiff in error or otherwise.

In Bradshaw *v.* State, 22 N. W. Rep., 361, a similar question was before this court, and it was held that "Before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this State is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling had upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectional line of argument, an exception to the decision can be noted."

There being no ruling of the court, we cannot say the court erred. The question did not afterwards arise, as the line of argument objected to was abandoned.

We find no error in this record.

The judgment of the district court is therefore affirmed.

And afterwards, to wit, October 15, 1885, there was filed in said clerk's office a certain motion for a rehearing, in the words
67 and figures following:

Motion for Rehearing.

In the Supreme Court of Nebraska.

QUIN BOHANON *vs.* THE STATE OF NEBRASKA.

Comes now the plaintiff in error and moves the court for a rehearing in this cause for the reason that the court overlooked and failed to pass upon the provision of our State constitution which provides that "No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense."

C. E. MAGOON, O. P. MASON,
Att'ys for Pl'tf.

And afterwards, to wit, October 21, 1885, the following order and judgment was made by the court and entered of record, to wit:

Error from Otoe County.

QUIN BOHANON
v.
THE STATE OF NEBRASKA. } No. 2024.

This cause came on to be heard upon a motion by plaintiff for a rehearing, which was submitted to the court, on consideration whereof it is considered by the court that the said motion be, and it hereby is, overruled.

And afterwards, to wit, October 21, 1885, there was filed in said clerk's office a certain petition for allowance of a writ of error from the Supreme Court of the United States in the words and figures following, to wit:

Petition for Writ of Error.

In the Supreme Court of the State of Nebraska.

68 QUIN BOHANON *vs.* THE STATE OF NEBRASKA.

Your petitioner complains for that heretofore and on the 3d day of September, 1885, a judgment or decree was rendered in the supreme court of Nebraska, being the highest court of law or equity in said State in which a decision could be had in said suit, wherein said Quin Bohanon was plaintiff in error, and the State of Nebraska defendant in error, wherein was drawn in question the construction of Article V of the amendments to the Constitution of the United States, that there is error in the decision of said court in this: That the plea of *autrefois acquit* interposed by the said plaintiff in error was adjudged to be bad, which said decision is final and to the great damage of this petitioner. See record, pages ——.

QUIN BOHANON,
By C. E. MAGOON AND O. P. MASON,
His Attorneys.

And afterwards, to wit, October 21, 1885, the following order and judgment was had and rendered by the court and entered of record, to wit:

Error from Otoe County.

QUIN BOHANON
vs.
THE STATE OF NEBRASKA. } No. 2024.

This cause coming on further to be heard upon an application for allowance of a writ of error from the Supreme Court of the United States, which was submitted to the court, it is further considered by the court that said application be denied and that plaintiff have forty days within which to prepare a bill of exceptions.

69 THE STATE OF NEBRASKA, ss:

I, Guy A. Brown, clerk of the supreme court of said State, do hereby certify the foregoing to be a true transcript of the record and proceedings filed, had, and done in a certain action lately pending in said court, wherein Quin Bohanon was plaintiff, and the State of Nebraska defendant, except that in place of the petition in error, transcript, and bill of exceptions filed in said cause an abstract thereof containing so much of said petition in error, transcript, and bill of exceptions as touch upon the question of former jeopardy, according to the stipulation of the parties annexed thereto, appears.

In witness whereof I have hereunto set my hand and the seal of the supreme court of Nebraska, this 20th day of November, 1885.

GUY A. BROWN, [SEAL.]
Clerk Supreme Court of Nebraska.

70 (Copy.)

UNITED STATES OF AMERICA, ss:

[SEAL] The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Quin Bohanon, plaintiff in error, and The State of Nebraska, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damages of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further

71

to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-second day of December, in the year of our Lord one thousand eight hundred and eighty-five.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
(Signed) SAM. F. MILLER,
Justice Sup. Court.

To operate as a supersedeas.

72 Jan'y 11, 1886.—I hereby accept service of the within writ of error.

WM. LEESE,
Att'y Gen'l of Nebr.

Jan. 12, 1886.—I hereby accept service of the within writ of error.
GUY A. BROWN,
Clerk Supreme Court.

Jan. 13, 1886.—I hereby accept service of the within writ of error.
SAMUEL MAXWELL,
Chief Justice.

THE STATE OF NEBRASKA, ss:

In obedience to the command of the within writ I hereby return the same, together with a transcript of the record and proceedings (according to the stipulation of the parties) of the said cause of Quin Bohanon *v.* The State of Nebraska.

Witness my hand and the seal of said court this 19th day of January, 1886.

[SEAL.] GUY A. BROWN,
Clerk Supreme Court Nebr.

Endorsed on cover: Nebraska supreme court. No. 1261. Quin Bohanan, plaintiff in error, *vs.* The State of Nebraska. Filed January 30, 1886.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.
} No. 1261.

MOTION TO DISMISS.

And now comes the Defendant in Error, and moves the Court to dismiss the Writ of Error in this case for the reasons following, to-wit:

First. The Court is without jurisdiction to review the judgment contained in the record, brought up in this cause, there being no Federal question therein presented.

WM. LEESE,
Att'y-Gen'l. of Nebraska,
for Defendant in Error.

SIR: Please take notice that on Monday, the 12th day of April, A. D. 1886, at the opening of Court on that day, or, as soon thereafter as counsel can be heard, a motion, of which the

foregoing is a copy, will be submitted by me to the Supreme Court of the United States for its decision.

Annexed hereto is a copy of my brief or argument in support of said motion.

WM. LEESE,
Att'y-Gen'l. of Nebraska,
for Defendant in Error.

To O. P. MASON,
Att'y for Pl'ff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1885.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.
} No. 1261.

BRIEF ON MOTION TO DISMISS.

On the 20th day of November, A. D. 1885, the following stipulation was entered into, by, and between the parties. (Record, page 1.)

IN THE SUPREME COURT OF THE STATE OF NEBRASKA.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

Saving and reserving to the State of Nebraska all its rights and privileges of exceptions to the jurisdiction of the Supreme Court of the United States, over the question of twice in jeopardy, under the fifth amendment to the Constitution of the

United States, *as presented* and set forth in the accompanying transcript. It is hereby stipulated by the parties to the above entitled action, that the accompanying abstract contains all of the Petition in Error, Transcript and Bill of Exceptions filed in the Supreme Court of Nebraska touching the question of former jeopardy. And it is further stipulated between the parties that the same may be used by either party, if desired, as a complete record on the above question of twice in jeopardy.

Dated Lincoln, Neb., Nov. 20, 1885.

WM. LEESE,
Att'y-Gen'l. of Nebraska.
O. P. MASON,
Attorney for Defendant.

The argument is limited by the stipulation to the one question, arising upon the construction to be given, *to that part of the fifth amendment* to the Constitution of the United States, which provides:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of Life or Limb."

The following is a brief statement of the facts of the case effecting this question:

In February, 1882, Bohanan was indicted by the Grand Jury of Lancaster county, Nebraska, for killing one Cook, (see Record, page 4,) in said county. To the indictment Bohanan interposed a plea in abatement, asserting the illegality of the Grand Jury, presenting an issue of fact. The Judge of the District Court denied the accused the right to try the issue raised.

On the trial of the cause in the District Court, Bohanan was convicted of murder in the second degree and sentenced to imprisonment for life, a motion for a new trial being filed and overruled. Bohanan filed his Petition in Error in

the Supreme Court of the State praying that said judgment and sentence might be set aside and a new trial granted. (Record, page 5.) And the Supreme Court says:

> "For the error in denying the prisoner a trial of the "issue, taken on his plea in abatement the judgment must "be reversed. The verdict set aside."
>
> *Bohanan vs. The State, 15th Nebraska, 215.*

The venue was changed at Bohanan's request (Record, page 10) from Lancaster to Otoe county, in the same District, and on a second trial on the indictment (the plea in abatement being waived, Record, pages 9 and 10). The jury of Otoe county found him guilty of murder in the first degree, and he was by the Court sentenced to death. It nowhere appears from the Record in this case, either in the application for a change of venue, or in the objections to the admissibility of evidence, to the charge of the Court as given, or to the refusal to charge as requested, or in the motion for a new trial, the assignment of Errors in the Supreme Court of the State, or, in the opinion filed in that Court, that any Federal question was presented for consideration, or in any way relied on before the final judgment from which the Writ of Error has been taken. Such being the case, this tribunal cannot take jurisdiction.

Simmerman vs. Nebraska, 6th U. S. Supreme Court Reporter, No. 9, Page 333.
Detroit Railway Co., vs. Guthard, 114 U. S. 134.
Brown vs. Colorado, 106 U. S. 95.

After the Petition in Error was filed in the Supreme Court, the Plaintiff in Error asked, and obtained leave, to file an additional Assignment of Error, (Record, page 2) as follows:

"That the said Court erred in putting the said Defendant twice in jeopardy for the same offense, in violation of, and in disregard of Article V of the amendments to the Constitution of the U. S.," which provides:

"Nor shall any person be subject for the same offense, to be twice put in jeopardy of Life or Limb."

And the Court erred in disregarding the Constitution of the State of Nebraska, Section 12, of the Bill of Rights, which provides: "That no person shall be compelled in any criminal case to give evidence against himself, or, be twice put in jeopardy for the same offense." The Record shows that said Quin Bohanan has been once acquitted of murder in the first degree.

III.

This Court has so frequently held that the fifth amendment to the Constitution of the United States does not extend to the States, but operates solely as a limitation on the exercise of power by the Federal Government; then under this rule the judgment brought up by the Writ of Error, having been rendered by the Supreme Court of the State of Nebraska, this tribunal can exercise no jurisdiction over it.

John Barron, Executor vs. The Mayor and City of Baltimore, 7th Peters, (32 U. S.) page 246.
Twitchell vs. Commonwealth, 7 Wall., U. S. page 321.
Malinda Fox vs. Ohio, 46 U. S., 434 and 435.

The Supreme Court of Nebraska says in passing upon this question, page 42, Record:

"So far as the provisions of the Constitution of the United States may be invoked, we take it, as pretty well settled now, that that provision governs the Courts existing by virtue of the laws of the United States, and has no application to State Courts."

Citing, U. S. vs. Keen, 1st McLean, 438.

And cases cited above; and such has been the rulings of various State Courts.

Livingston vs. Mayor of N. Y., 8 Wend., p. 85.
Commonwealth vs. Hitchings, 5 Gray, (Mass.) 482.
Commonwealth vs. Pomeroy, 5 Gray, (Mass.) 486.
Barker vs. People, 3 Cowen, N. Y., 686.
Boyd vs. Ellis, 11th Iowa, page 97.
Prescott vs. State, 19th Ohio State, 184.
State vs. Shumpert, 1 South Car., 85.
North Mo. R. R., et. al. vs. Maguire, 49 Mo., 490.
Colt vs. Ives, 12 Conn., 243.

In the case of Kring vs. Missouri, 107, U. S., 221, which came up on the right of a State to pass an *expost facto* law under Sec. 10, Article 1, of the Constitution, Justice Miller in rendering the opinion, says on page 226:

> "It was one of the objections most seriously urged "against the new Constitution by those who opposed its "ratification by the States, that it contained no for- "mal Bill of Rights. And the State of Virginia accom- "panied her ratification by the recommendation of an "amendment embodying such a bill. The feeling on this "subject led to the adoption of the first ten amendments "to that instrument at one time, shortly after the Gov- "ernment was organized. *These are all designed to operate "as restraints on the general Government*, and most of them "for the protection of private rights of persons and "property."

IV.

No such question is raised in the case at bar, as an *expost facto* law, but the question on the fifth amendment is limited by the stipulation, with all the rights and privileges of the State of Nebraska reserved to except to the jurisdiction of this tribunal over the one question therein presented.

V.

Before jurisdiction can be exercised by this Court, it must appear from the Record affirmatively, or by fair implication, that a Federal question necessary to the determination of the cause is involved.

Boughton vs. Exchange Bank, 104 U. S., 72.
Chouteau vs. Gibson, 111 U. S., 200.
Detroit Railway Co. vs. Guthard, 114, U. S., 135.

VI.

And as this Court has repeatedly held that the fifth amendment *as a whole* does not restrain the States, I cannot concieve upon what theory, a part of the same amendment can have greater force than the whole of it. The running stream can rise no higher than the spring creating it. Therefore, there being no Federal question presented by the Record brought up in this case, this Court cannot incorporate into the Record any new matter, but will act on the case as made to the Court below, on the one question presented in the stipulation.

It is respectfully submitted, that the Writ of Error should be dismissed.

J. B. STRODE,
J. C. WATSON,
W. R. KELLEY,
of Counsel.

WM. LEESE,
Att'y-Gen'l. of Nebraska,
for the Motion.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

The plaintiff in error was indicted in the state court of Nebraska, charged with murder in the first degree. Upon trial thereof he was convicted of murder in the second degree. Error prejudicial to him having occurred on this trial, the supreme court of Nebraska awarded him a new trial. When his case was remanded to the lower court he was again placed on trial on the same indictment which he defended against on the first trial. To this indictment plaintiff in error filed a plea of *autre fois acquit* as to the charge of murder in the first degree, setting forth the facts of his previous conviction on said indictment of murder in the second degree. This plea was adjudged bad by the trial court, for the reason that the former judgment had been set aside at the instance of the plaintiff in error. No question is raised as to form of the plea, the decision being as to its merits. The question

was again presented to the trial court by way of a request for an instruction to the jury to the effect that, by reason of the previous acquittal, they could not convict the accused of murder in the first degree, which instruction was refused, whereupon the jury convicted this plaintiff in error of murder in the first degree, and the court sentenced him to be hanged. This cause was again taken to the supreme court of Nebraska, and these rulings, with other matters, asigned as errors, but the judgment of the lower court was by the supreme court affirmed, whereupon this plaintiff in error brought his cause to this court and secured the issuance of the writ of error which is now assailed.

The questions raised by the motion to dismiss are:

1. Was a federal question presented for consideration to the state court, or relied upon therein, before the final judgment, from which the writ of error has been taken?

2. Is there a federal question presented by the record herein of which this court has jurisdiction?

I.

As regards the first question, an examination of the record discloses that one of the assignments of error in the petition in error before the supreme court of the state of Nebraska was as follows:

> The said court erred in putting the said defendant twice in jeopardy for the same offense in violation of and in disregard of Article V. of the amendments to the constitution of the United States, which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
>
> (See Record, page 4.)

The protection of the federal constitution was therefore especially invoked while this case was before the state court. Not only was the protection guaranteed by the federal constitution especially invoked, but that protection was by the court especially denied.

In rendering their opinion the supreme court of Nebraska say:

So far as the provisions of the constitution of the United States may be invoked, we take it as pretty well settled now that those provisions govern the court existing by virtue of the laws of the United States, and has no application to the state courts. We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree, the granting of a new trial having the effect of setting aside all the results of the former trial.

(See Record, p. 48.)

Upon his trial in the state court this plaintiff in error requested the court to give the jury the following instruction: "If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the state of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon which trial was found guilty of murder in the second degree, and judgment was rendered against him on said finding, then, as a matter of law, the jury in the case cannot find the defendant guilty of murder in the first degree," which instruction was by the court refused, to which ruling the defendant excepted. (Record, page 21.)

The court, on its own motion, gave the following instruction: "You should not be influenced in the least by anything that any other jury may have done," which was duly excepted to. (See Record, page 21.)

The errors committed by reason of the court's rulings on said instructions were duly called to its attention by motion for new trial (see Record, page 22), and were presented to the supreme court of Nebraska by petition in error. (See Record, page 3.)

In Furman v. Nichol this court say: "It is urged that the particular provision of the Constitution which the plaintiffs in error say has been violated in its application to their case should be contained in the pleadings, but this is in no case necessary. If the record shows either by express averment or by clear and necessary intendment that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in

the case, was decided adversely to the plaintiffs in error, and that the court was induced to make the judgment which it did."

Furman v. Nichol, 8 Wall., 56.

The defendant in error is therefore mistaken in asserting that the federal questions involved were not urged before the final judgment from which this writ of error was allowed by this court.

II.

Has this court jurisdiction?

The jurisdiction of this court is established by the constitution. It was fixed by the people acting in their sovereign capacity. It is to the constitution that we must look for an answer to this question. Section 2 of Article III. of the constitution provides:

> The judicial power shall extend to all cases, in law or equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, etc.

This court has held that criminal cases were included in the words "law and equity."

Tennessee v. Davis, 100 U. S., 257.

Section 2 of Article VI. of the constitution is as follows:

> This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The constitution is by this clause made a part of the organic law of each state.

Taylor v. Taintor, 16 Wall., 366.

In that case the majority of this court say, "It is true that the constitutional provision under which the arrest and delivery were made is obligatory upon every state and a part of the law of every state."

And JJ. Field, Miller, and Clifford in their dissenting opinion say:

"The constitution of the United States declares its own supremacy and that of the laws made in pursuance of it. As the supreme law of the land they are of course to be enforced and obeyed however much they may interfere with the law or constitution of any state."

While the appellate powers of this court are given by the constitution, they are limited and regulated by the acts of congress.

The judiciary act of 1789 contained the following provision:

> That a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, *where is drawn in question* the validity of a treaty or statute of, or an authority exercised under the laws of the United States, and the decision is against their validity; or *where is drawn in question* the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such validity, or *where is drawn in question* the construction of any clause of the constitution or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error.

This act was amended by that of 1867, which provided,

> That a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against the validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege, or *immunity is claimed* under the constitution, or any treaty or statute of, or commission held, or authority exercised, under the United

States, and the decision is against the title, right, privilege, or immunity specially *set up or claimed* by either party under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, etc.

These provisions of the statutes are set out in full in order to direct attention to the enlargement of this court's jurisdiction by the act of 1867. The act of 1789 made provision that writs of error should be allowed only in cases where the validity of a treaty, authority exercised under the United States, the validity of a statute, or a right, privilege, or immunity claimed under the federal constitution, statutes, treaties, etc., *were drawn in question*.

The act of 1867 preserves the language "*drawn in question*" until it reaches the provisions regarding rights, privileges, and immunities, where the language used is, "where any title, right, privilege, or immunity *is claimed* under the constitution or any treaty or statute of or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity specially set up or *claimed*, may be re-examined, etc." That is, that a party to an action who *claims* a right, privilege, or immunity under the federal constitution, statutes, treaties, or authority, may by virtue of his *claim* have the question passed upon by this court.

It is the claim of a right, privilege, or immunity under the Federal Constitution which gives the jurisdiction.

Wheat. Dig. Dec. Tit. Const. Law V. (B.), 186.

The decision upon that claim as it appears upon the record is the exercise of the jurisdiction.

That the claim to immunity appears upon the record cannot be denied in this case more than any other. The claim may even be an absurd one, but this court cannot be called upon on a motion to dismiss the writ of error to condemn it as such. All argument upon the sufficiency of the claim is premature, so long as it is *sub judice*, whether the court can examine its sufficiency. The plaintiff in error

sets up a claim to his life under the constitution and laws of the United States, and the state denies it. By whom is this question to be decided? It is a right, privilege, or immunity, within the very words of the judiciary act, set up or claimed by the party under the constitution and laws of the union. The question is, whether the party setting up the claim, and that claim being to the most sacred right of man, to life, is to be turned out of court without being heard upon the merits of his case. Upon this motion to dismiss the writ of error you can only inquire into the jurisdiction, and cannot look into the merits. You are asked to turn the party out of court without giving him an opportunity to show that by the laws and constitution of the union he is entitled to the right and privilege which he claims. It is no answer to say that any individual may allege that he has such privilege in order to remove his case from the state court to this, because no injury would ensue, as the case would be sent back with damages, and even if there might be some inconveniences from improperly bringing causes here, they ought rather to be submitted to, than to hazard the possible violation of the constitutional rights of a citizen.

The view here contended for has been taken by this court, even under the act of 1789. In the case of Furman vs. Nichol, 8 Wall., 56, the court say:

"It is enough for the purposes of this suit to say that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the state court."

Furman vs. Nichol, 8 Wall., 56.

In Cohens vs. Virginia, the court say:

"If it be maintained that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right

of the one party as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."

Cohens vs. Virginia, 6 Wheat., 379. (Opinion of court.)

And further on in the same case the court say: "Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the union."

Ib., page 411.

Since the passage of the Judiciary Act of 1867, this court have again passed upon this question in the case of Murdock vs. Memphis, wherein the language used is: "It has been many times decided by this court, on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits." (See opinion, page 628). And after discussing the entire question of jurisdiction the court further say: "It was, no doubt, the purpose of congress to secure to every litigant whose rights depended on any question of federal law, that that question should be decided for him by the highest federal tribunal if he desired it, when the decisions of the state courts were against him on that question. That rights of this character guaranteed to him by the constitution and laws of the union should not be left to the exclusive and final control of the state courts."

Murdock vs. Memphis, 20 Wall., p. 632.

The view of the law here contended for is not new or strained. It is the ancient appeal to Cæsar. The right of the subject to invoke the protection of his sovereign. The constitution in our government takes the place of the will of Cæsar, and instead of the king as the

highest exponent of the law, we have this tribunal. To it we bring this claim of right to life under the Federal Constitution, confident that it will at least be accorded a hearing.

III.

It is urged that the right claimed is founded on the fifth amendment to the constitution, and thereupon it is alleged that that amendment is not obligatory upon the state of Nebraska, and therefore can not avail this plaintiff in error. But whether it can or not is the very question to be determined, when the merits come to be considered, which the writ of error gives authority to decide; and which can not be decided without entertaining the writ of error. The argument on the other side proceeds in a vicious circle. It is asserted that you must quash the writ of error, because you have no jurisdiction over the case or question. It is then said that you must take jurisdiction of, and inquire into the case and the question in order that you may dismiss the writ of error; or, in other words, you have and you have not jurisdiction over the case and question, and you ought to decide them in order to see that you ought not to decide them. Whether or not his plea is sufficient, whether or not the question presented has been heretofore decided by this court must be determined upon a hearing of the merits. It cannot be ascertained at this time.

IV.

For the purposes of this motion we think the foregoing is sufficient. And at this time we do not intend to discuss the merits of the case or the question involved. But as peradventure it might be thought that no question was involved we will go further.

The history of the Judiciary Act of 1867 is significant, and throws a strong light upon the questions involved herein. The published proceedings of the two houses of congress show that the bill which subsequently became a law was reported by a committee which had been instructed "to inquire and report what legislation was necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States, under the

joint resolution of congress of March 3d, 1865, *and the liberty of all persons under the operation of the constitutional amendment abolishing slavery.*"

Cong. Globe, first session 39th Congress, part 5, page 4151.

The effect of this bill was declared by the member of the house of representatives who reported it from the committee to be "to enlarge the privilege of the writ of *habeas corpus* and make the jurisdiction of the courts and judges of the United States co-extensive with all the powers that can be conferred upon them. It is a bill of the largest liberty."

Congressional Globe, first session 39th Congress, part 5, page 4151.

In the senate an inquiry was made "whether the second section was drawn *on the same principle* as the twenty-fifth section of the Judiciary Act of 1789." The reply was, "It is a little broader than the Judiciary Act. It is of a similar character."

Ib., page 4229.

In discussing this act this court say: "The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment."

Stewart v. Kahn, 11 Wall., 504.

Viewed in this or any other proper light, it is impossible to see how this law can afford relief under the provisions of the thirteenth amendment and deny it to a claim under another amendment equally as general in its provisions. Prior to the passage of the act of 1867, this court had held that decisions by state courts regarding matters affected by the amendments to the constitution were not properly matters for review in this court. Congress desiring to give this court the right to review such questions, passed that act which is broad in its character and general in its declarations. There is nothing in it which requires or will warrant a narrow construction. It must necessarily have been the intention of congress to confer upon this court general powers of review as in the act set forth.

There is another view of this question which we desire to urge upon this court. When Nebraska was admitted into the Union as a state the several amendments to the federal constitution had been adopted, and were the supreme law of the land, and were as much a part of that constitution as any of its original provisions, and the 13th section of the enabling act provided, among other things, "that the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere in the United States," and that provision of the fifth amendment, which we invoke in behalf of human life, was as much a guaranty to the accused for the protection of his life, as that provision of the constitution which makes sacred contract obligations, and secures them against the invasion of legislative or judicial power.

Whatever may have been held to be the rule as to those states admitted into or constituting the Union prior to the adoption of the fifth amendment to the federal constitution previous to the time of enacting the judiciary act of 1867, there can be no question that as to those admitted after its adoption, it was a part of the supreme law and occupied the same relation to Nebraska and her citizens that the original constitution did to the states and citizens thereof which originally comprised the Union.

Not only by the federal constitution itself, and the act which enabled Nebraska to become a state, did this amendment become part of that state's organic law, but the people of that commonwealth in creating their state constitution adopted the language of the fifth amendment and provided that "no person shall be twice put in jeopardy for the same offense."

Article 12, Bill of Rights, Constitution of Nebraska.

V.

It may be true, as is said by Ch. J. Marshall, that the 5th and 6th amendments to the constitution were passed to provide against anticipated encroachments by the federal government upon the rights of the citizens. It is likewise true that a time arrived when the people

of this nation became alarmed lest the states should violate individual rights. To meet the danger thus threatened, the people adopted the 13th and 14th amendments to the constitution. Section 1 of the 14th amendment makes provision as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Clearly this is a restriction upon the states. The condition of affairs which rendered it necessary are a part of contemporaneous history. The states of a large section of this country were denying the rights of the citizen to a large class of individuals. The nation, jealous of the rights of its citizens, created this amendment to render such denial impossible, not alone in the south, but throughout the union.

In discussing this amendment the court say, in Virginia vs. Rives: "The provisions of the fourteenth amendment of the constitution we have quoted, all have reference to state action exclusively. It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities—and the prohibitions of the amendment extend to all action of the state, whether it be action by one of these agencies or by another."

Virginia vs. Rives, 100 U. S., 318.

And in United States vs. Harris the court say, in speaking of this section: "It is perfectly clear from the language of the first section that its purpose also was to place a restraint upon the action of the states."

United States vs. Harris, 106 U. S., 638.

And in United States vs. Cruikshank, the language used in referring to this section is: "It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exercise of arbitrary and tyrannical power on the part of the government and legislature of the state."

United States vs. Cruikshank, 1 Woods, 308.

The plaintiff in error comes into this court, claiming that the state of Nebraska is about to take his life, "without due process of law, and that the state of Nebraska has abridged his privileges and immunities." Is this court at liberty to refuse to listen to this claim? Or can this court say that claim is not well founded without an examination into the merits of it? Can this court enter upon the examination of the merits while considering the question of its jurisdiction to make such examination? Certainly these interrogatories must be answered in the negative, and consequently the motion to dismiss must be overruled.

VI.

Under the view of the law hereinbefore presented, the decisions cited by counsel for the state of Nebraska are nowise in point. A brief consideration of them will show that upon this motion they ought not to be considered. All the cases cited by the defendant in error rely upon the early case of Barron v. Mayor, etc., 7 Peters, 243. This case was heard upon its merits, not on motion to dismiss, and turned upon the question of the right of the city of Baltimore in the exercise of its corporate authority over the harbor, the pavement, and grading of streets, and the health of the city, to divert certain streams of water from their natural channels. This case was decided in 1833, long before the passage of the judiciary act of 1867 or the adoption of the fourteenth amendment. Had that act been in existence at that time I have no doubt the exposition of the constitution given by congress in that act would have guided this court to a different conclusion than the one arrived at. In the case of Twitchell v. Commonwealth, decided in 1868, this court say: "We are by no means prepared to say that, if it were an open question whether the fifth and sixth amendments of the constitution apply to the state governments, it would not be our duty to allow the writ applied for, and hear argument on the question of repugnancy. We think, indeed, that it would."

Twitchell v. Com., 7 Wall, 325.

We think the act of 1867 makes this an open question. It was passed for the express purpose of enlarging this court's jurisdiction, so

as to protect rights established by the constitutional amendments. It is true that this decision was rendered in 1868, but, as was said in Murdock v. Memphis, "apparently it happened that the fact that congress had passed the act of 1867 was hardly noted for some time within the precincts of this bar—where the venerable judiciary act of 1789 was in some sort regarded as only less sacred than the constitution, and most unlikely to be wished to be altered—and that the less studious observers considered that the new section was but a careless transcript of the old one. However, the more careful readers were early awakened by possibilities of meanings in the second section of the new act which would have far-reaching effects. Mr. Phillips, in his work on practice in this court, early observed that the new act, 'in some of its provisions and omissions, seems to have been intended to work a change in the exercise of the jurisdiction of the court.'"

Phillips' Practice, page 128.
20 Wallace, 394.

The case of Fox v. Ohio, decided in 1847, and relied upon by the defendant in error, is one in which arose the question of two punishments for the same offense; and this court expressly held that the facts shown constituted two distinct offenses, each of which were punishable. One by the state, the other by the federal government. In that case this court say: "It is almost certain that in the benignant spirit in which the institutions both of the state and federal systems are administered an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity or where the public safety demanded extraordinary rigor."

In the case at bar the "benignant spirit" has not proved sufficient to secure our constitutional and natural rights, hence the appeal to this court.

In this brief and argument we have tried to avoid reference to the merits of the case, and confine ourselves to the question of jurisdiction. Upon a hearing of the merits there is much to be presented which

could not properly come before the court at this time. The writ assailed by this motion was made returnable in October, 1886; an attack thereon at this time seems to be in undue haste. The question of jurisdiction raised by this motion is not lost to the state of Nebraska if this motion be overruled. It may be considered on a hearing of the merits. Nothing is lost to the state by overruling this motion. To sustain it means the summary taking of this plaintiff's life while the invocation of the powers of the federal constitution is yet upon his lips; with the merits of his claim, the extent of his wrongs, or the character of his rights not even examined or considered. We do not think this court will consent to so revolting a travesty.

CHAS. O. WHEDON,
[redacted],
CHAS. E. MAGOON,
O. P. MASON,
Atty's for Plaintiff in Error.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1261.

QUIN BOHANAN,
Plaintiff in Error.

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR.

The attorney for the defendant in error having suggested to this court the escape of the accused, the plaintiff in error, by his counsel, asks that the court hear and determine this case upon its merits, because of the importance of the questions involved to the citizens of the United States, and for the further reason that if the plaintiff in in error is recaptured (and in these days of newspapers, telegraphs, and detective associations, ultimate escape is well-nigh impossible), the punishment inflicted upon him will be death, and he will go to the gallows with the invocation of the powers of the federal constitution upon his lips; with the merits of his claim, the extent of his wrongs, and the character of his rights not even examined or considered. To hear or not to hear the claim of this man to his life lies within the discretion of the court, and the issue being not only one of

life or death to this plaintiff in error, but of far-reaching power, unceasing interest and illimitable value, not only to the present citizens of the republic, but to the generations yet to be, we are persuaded that the court will direct its discretion in the way of public interest, and hear and determine the questions of rights and immunities of American citizenship herein presented:

Smith v. United States, 94 U. S., 97.

The questions are of grave and serious import, affecting both private and public rights, and interests of great magnitude, and involve a consideration of what additional restriction upon the policy of the states has been imposed by the fourteenth amendment to the constitution of the United States.

STATEMENT OF THE CASE.

The plaintiff in error was indicted in the state court of Nebraska, charged with murder in the first degree. Upon trial thereof he was convicted of murder in the second degree. Error prejudicial to him having occurred on this trial, the supreme court of Nebraska awarded him a new trial. When his case was remanded to the lower court he was again placed on trial on the same indictment which he defended against on the first trial. To this indictment plaintiff in error filed a plea of *autre fois acquit* as to the charge of murder in the first degree, setting forth the facts of his previous conviction on said indictment of murder in the second degree. This plea was adjudged bad by the trial court, for the reason that the former judgment had been set aside at the instance of the plaintiff in error. No question is raised as to form of the plea, the decision being as to its merits. The question was again presented to the trial court by way of a request for an instruction to the jury to the effect that, by reason of the previous acquittal, they could not convict the accused of murder in the first degree, which instruction was refused, whereupon the jury convicted

this plaintiff in error of murder in the first degree, and the court sentenced him to be hanged. This case was again taken to the supreme court of Nebraska, and these rulings, with other matters, assigned as errors, but the judgment of the lower court was by the supreme court affirmed, whereupon this plaintiff in error brought his cause to this court and secured the issuance of the writ of error which is now to be considered.

The questions presented by the petition in error are:

1. Was a federal question presented for consideration to the state court, or relied upon therein, before the final judgment, from which the writ of error has been taken?

2. Is there a federal question presented by the record herein of which this court has jurisdiction?

3. Is the state of Nebraska about to abridge his rights, privileges, and immunities?

4. Has the plaintiff in error been once in jeopardy?

As regards the first question, an examination of the record discloses that one of the assignments of error in the petition in error before the supreme court of the state of Nebraska was as follows:

> The said court erred in putting the said defendant twice in jeopardy for the same offense in violation of and in disregard of Article V. of the amendments to the constitution of the United States, which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."
>
> (See Record, page 4.)

The protection of the federal constitution was therefore especially invoked while this case was before the state court. Not only was the protection guaranteed by the federal constitution especially invoked, but that protection was by the court especially denied.

In rendering their opinion the supreme court of Nebraska say:

> So far as the provisions of the constitution of the United States may be invoked, we take it as pretty well settled now that those provisions govern the court existing by virtue of the laws of the United States, and has no application to the state courts. We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree, the granting of a new trial having the effect of setting aside all the results of the former trial.
>
> (See Record, p. 48.)

Upon his trial in the state court this plaintiff in error requested the court to give the jury the following instruction: "If the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the state of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon which trial was found guilty of murder in the second degree, and judgment was rendered against him on said finding, then, as a matter of law, the jury in the case cannot find the defendant guilty of murder in the first degree," which instruction was by the court refused, to which ruling the defendant excepted. (Record, page 21.)

The court, on its own motion, gave the following instruction: "You should not be influenced in the least by anything that any other jury may have done," which was duly excepted to. (See Record, page 21.)

The errors committed by reason of the court's rulings on said instructions were duly called to its attention by motion for a new trial (see Record, page 22), and were presented to the supreme court of Nebraska by petition in error. (See Record, page 3.)

In Furman v. Nichol, this court say: "It is argued that the particular provision of the constitution which the plaintiffs in error say has been violated in its application to their case should be contained in the pleadings, but this is in no case necessary. If the record shows

either by express averment or by clear and necessary intendment that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced to make the judgment which it did."

Furman v. Nichol, 8 Wall., 56.

This court, in passing upon the motion to dismiss the bill filed herein, say: "Bohanan set up specially an immunity from a second trial for the same offense by reason of Article V. of the amendments of the constitution of the United States. This was denied him by the judgment of the supreme court of the state, and we have jurisdiction to review that decision."

Bohanan v. State, 118 U. S., 231.

II.

Has this court jurisdiction?

The jurisdiction of this court is established by the constitution. It was fixed by the people acting in their sovereign capacity. It is to the constitution that we must look for an answer to this question. Section 2 of Article III. of the constitution provides:

> The judicial power shall extend to all cases, in law or equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, etc.

This court has held that criminal cases were included in the words "law and equity."

Tennessee v. Davis, 100 U. S., 257.

Section 2 of Article VI. of the constitution is as follows:

> This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The constitution is by this clause made a part of the organic law of each state.

Taylor v. Taintor, 16 Wall., 366.

In that case the majority of this court say, "It is true that the constitutional provision under which the arrest and delivery were made is obligatory upon every state and a part of the law of every state."

And J.J. Field, Miller, and Clifford, in their dissenting opinion, say:

"The constitution of the United States declares its own supremacy and that of the laws made in pursuance of it. As the supreme law of the land they are of course to be enforced and obeyed however much they may interfere with the law or constitution of any state."

While the appellate powers of this court are given by this constitution, they are limited and regulated by the acts of congress.

The judiciary act of 1789 contained the following provision:

> That a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, *where is drawn in question* the validity of a treaty or statute of, or an authority exercised under the laws of the United States, and the decision is against their validity; or. *where is drawn in question* the validtiy of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties, or laws of the United

States, and the decision is in favor of such validity, or *where is drawn in question* the construction of any clause of the constitution or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error.

This act was amended by that of 1867, which provided,

That a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against the validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision in favor of their validity, or where any title, right, privilege, or *immunity is claimed* under the constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity specially *set up or claimed* by either party under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, etc.

These provisions of the statutes are set out in full in order to direct attention to the enlargement of this court's jurisdiction by the act of 1867. The act of 1789 made provision that writs of error should be allowed only in cases where the validity of a treaty, authority exercised under the United States, the validity of a statute, or a right, privilege, or immunity claimed under the federal constitution, statutes, treaties, etc., *were drawn in question*.

The act of 1867 preserves the language "*drawn in question*" until it reaches the provisions regarding the rights, privileges, and immunities, where the language used is, "where any title, right, priv-

ilege, or immunity *is claimed* under the constitution or any treaty or statute of or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity specially set up or *claimed*, may be re-examined," etc. That is, that a party to an action who *claims* a right, privilege, or immunity under the federal constitution, statutes, treaties, or authority, may by virtue of his *claim* have the question passed upon by this court.

It is the claim of a right, privilege, or immunity under the Federal constitution which gives the jurisdiction.

Wheat. Dig. Dec. Tit. Const. Law V. (B.), 186.

The view here contended for has been taken by this court, even under the act of 1879. In the case of Furman vs. Nichol, 8 Wall., 56, the court say:

"It is enough for the purpose of this suit to say that a cause can be removed from a state court into this court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the state court."

Furman vs. Nichol, 8 Wall., 56.

In Cohens vs. Virginia, the court say:

"If it be maintained that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party as well as of the other, and may truly be said to

arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."

Cohens vs. Virginia, 6 Wheat., 379. (Opinion of court.)

And further on in the same case the court say: "Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union."

Ib., page 411.

Since the passage of the Judiciary Act of 1867, this court have again passed upon this question in the case of Murdock vs. Memphis, wherein the language used is: "It has been many times decided by this court, on motion to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleading, prayer for instruction, or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on it's merits." (See opinion, page 628). And after discussing the entire question of jurisdiction the court further say: "It was, no doubt, the purpose of congress to secure to every litigant whose right depended on any question of federal law, that that question should be decided for him by the highest federal tribunal if he desired it, when the decisions of the state courts were against him on that question. The rights of this character guaranteed to him by the constitution and laws of the union should not be left to the exclusive and final control of the state courts."

Murdock vs. Memphis, 20 Wall., p. 632.

The view of the law here contended for is not new or strained. It is the ancient appeal to Cæsar—the right of the subject to invoke

the protection of his sovereign. The constitution in our government takes the place of the will of Cæsar, and instead of the king as the highest exponent of the law, we have this tribunal. To it we bring this claim of right to life under the federal constitution, confident that it will be accorded a hearing.

III.

It is urged that the right claimed is founded on the fifth amendment to the constitution, and thereupon it is alleged that that amendment is not obligatory upon the state of Nebraska, and therefore can not avail the plaintiff in error.

It may be true, as is said by Ch. J. Marshall, that the 5th and 6th amendments to the constitution were adopted to provide against anticipated encroachments by the federal government upon the rights of the citizens. It is likewise true that a time arrived when the people of this nation became alarmed least the states should violate individual rights. To meet the danger thus threatened, the people adopted radical and far-reaching measures. Among them are the fourteenth amendment to the constitution, and the passage by congress of the Judiciary Act of 1867. The fourteenth amendment is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

The effect of this amendment is to work a radical change in the character of American citizenship. Before its adoption federal citizenship was secured by reason of being a citizen of the state. After its

adoption, citizenship under the federal government was independently established. The provisions of this amendment are clearly restrictions upon the states. The condition of affairs which rendered it necessary are a part of contemporaneous history. The states of a large section of the country were denying the rights of the citizen to a large class of individuals. The nation, jealous of the rights of its citizens, adopted this amendment to render such denial impossible, not alone in the South, but throughout the Union.

In discussing this amendment the court say, in Virginia vs. Rives: "The provisions of the fourteenth amendment of the constitution we have quoted, all have reference to state action exclusively. It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities—and the prohibitions of the amendment extend to all action of the state, whether it be by one of these agencies or by another."

Virginia vs. Rives, 100 U. S., 318.

And in United States vs. Harris the court says, in speaking of this section: "It is perfectly clear from the language of the first section that its purpose also was to place a restraint upon the action of the states."

United States vs. Harris, 106 U. S., 638.

And in United States vs. Cruikshank, the language used in referring to this section, is: "It is a guaranty of protection against the acts of the state government itself. It is a guaranty against the exercise of arbitrary and tyrannical power on the part of the government and legislature of the state."

United States vs. Cruikshank, 1 Woods, 308.

In discussing the effects of the fourteenth amendment Mr Blaine says: "Important and essential as are the provisions of the four-

teenth amendment just cited, indispensable as they have proved in the system of southern reconstruction, they are relatively of small consequence when compared with that great provision which is for all time —that provision which establishes American citizenship upon a permanent foundation, which gives the humblest man in the republic ample protection against any abridgement of his privileges and immunities by state law, which secures to him and his decendants the equal protection of the law in all that relates to his life, his liberty, and property. The first section of the constitutional amendment which includes these invaluable provisions is in fact a new charter of liberty to the citizens of the United States; is the utter destruction of the pestilent heresy of state rights, which constantly menaced the prosperity and even the existence of the republic; and is the formal bestowment of nationality upon the wise federal system which was the outgrowth of our successful revolution against Great Britain."

"Before the adoption of this amendment, citizenship of the United States was inferred from citizenship of some one of the states, for there was nothing in the constitution defining or even implying national citizenship as distinct from its origination in or derivation from a state. It was declared in Article IV., section 2 of the Federal Constitution, that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; but nothing was better known than that this provision was a dead letter from its very origin. * * * But this rank injustice and this hurtful inequality were removed by the fourteenth amendment. Its opening section settled all conflicts and contradictions on this question by a comprehensive declaration which defined national citizenship and gave it precedence of the citizenship of a state. *All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the states wherein they reside.* These pregnant words distinctly reversed the origin and character of American citizenship. Instead of a man being a citizen of one of the states, he was now made a citizen of any state in which he might choose

to reside, because he was antecedently a citizen of the United States." "The consequences that flowed from this radical change in the basis of citizenship were numerous and weighty. Nor were those consequences left subject to construction or speculation. They were incorporated in the same section of the amendment. The language of the fourteenth amendment is authoritative and mandatory: '*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*' The provision is comprehensive and absolute, and sweeps away at once every form of oppression and every denial of justice. It abolishes *caste* and enlarges the scope of human freedom. It increases the power of the republic to do equal and exact justice to all its citizens, and curtails the power of the states to shelter the wrongdoer or to authorize crime by statute. To congress is committed the authority to enforce every provision of the fourteenth amendment, and the humblest man who is denied the equal protection of a state can have his wrongs redressed before the supreme judiciary of the nation."

Blaine's Twenty Years in Congress, vol. 2, pps. 312, 313, 314.

It is not as a citizen of the state of Nebraska, but as a citizen of the United States of America, that plaintiff in error comes before this court, asserting his right to life under the federal constitution, and appealing to that far-reaching source of power for the protection of his privileges and immunities. Once in jeopardy, and acquitted of the crime punishable with death, the state of Nebraska, acting through its judiciary, now seeks to take away his life for the same offense.

This amendment has been most learnedly and carefully considered and discussed by the federal courts, and to some of these discussions

your attention is directed. In the County of Santa Clara vs. Southern Pac. R. Co., the court, per Justice Field, say:

"The first section of the fourteenth amendment places a limit upon all the powers of the state, including, among others, that of taxation. After stating that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the states in which they reside, it declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any *person* (dropping the designation 'citizen') of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' The amendment was adopted soon after the close of the Civil War, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the states throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application, because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the *Dartmouth College Case*, to prevent the application of the provision prohibiting legislation by states impairing the obligation of contracts to the charter of the college, it being contended that the charter was not such a contract as the prohibition contemplated. Chief Justice Marshall, however, after observing that it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the constitution, when that clause was introduced, said: 'It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been

so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instruments, as to justify those who expound the constitution, in making it an exception.' 4 Wheat., 644. All history shows that a particular grievance suffered by an individual or a class, from a defective or oppressive law, or the absence of any law touching the matter, is often the occasion and cause for the enactments, constitutional or legislative, general in their character, designed to cover cases, not merely of the same, but all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation, provisions not merely for the security of those citizens, but to insure to all men, at all times, and at all places, due process of law, and the equal protection of the laws. Oppression of the person and spoliation of property by any state were thus forbidden, and equality before the law was secured to all. In the argument of the *San Mateo* case, in the supreme court, Mr. Edmunds, who was a member of the senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: 'There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand, which was not considered, and the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure'—to use his language—'secure, not according to the position of Vermont, or of Rhode Island, or of California, depending upon their local tribunal for its efficient exercise, but secure, as the right of a Roman was secure, in every province and in every place,

and secure by the judicial power, the legislative power, and the executive power of the whole body of the states and the whole body of the people.'

"With the adoption of the amendment the power of the states to oppress anyone, under any pretense, or in any form, was forever ended; and henceforth all persons within its jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to everyone in his private rights—in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends everyone everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society, or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed government holds at all times over everyone, man, woman, and child, in all its broad domain, wherever they may go, and in whatever relations they may be placed. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to anyone within its jurisdiction, the equal protection of the laws."

County of Santa Clara v. Southern Pacific R. R. Co., 18 Federal Rep., 396 (opinion).

How then stands the case? The plaintiff in error is a citizen of the United States. The fifth amendment to the constitution declares

that he shall not be twice placed in jeopardy for the same offense. That is bestowed upon him as a privilege and immunity. The fourteenth amendment provides that no state shall abridge the privileges or immunities of citizens of the United States. The state of Nebraska seeks to deprive him of his immunity from jeopardy, and thereby take his life. If it be claimed that plaintiff in error is a citizen of the state of Nebraska, and that therefore the state can exact the forfeit of his life, his answer is to ask what value are the constitutional guarantees and his federal citizenship if one can be avoided and the other destroyed by the very power against whom protection was sought to be given? It is the federal citizen who seeks this protection, appealing to the federal constitution. His claim is of a higher right and broader character than can be contained within the boundaries of a state. This court, speaking by Justice Miller, in *Loan Association v. Topeka*, said: "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism; it is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism. It may be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

Loan Association v. Topeka, 20 Wall., 655.

In protecting these rights this court has gone to the extent of saying:

"It is not impossible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues

affecting it, he has, by the laws of the state, a fair trial in a court of justice according to the modes of proceeding applicable to such a case."

Davidson v. New Orleans, 96 U. S., 97.

See also:

Missouri v. Lewis, 101 U. S., 22.

Mr. Justice Miller, in *Davidson vs. New Orleans*, after showing the difficulty, if not impossibility, of framing a definition of the constitutional phrase "due process of law" which should be "at once perspicuous, comprehensive, and satisfactory," adopts the rule of deducing the wisdom "in the ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require."

Davidson vs. New Orleans, 96 U. S., 97.

In this connection we desire to urge upon the court the fact that in considering the application of the fifth amendment to this case, we must remember that Nebraska was created a state out of territory acquired in the Louisiana purchase. Territory acquired from a foreign sovereignty, by the payment of moneys belonging to the federal government. Nebraska does not stand and never did stand in the same relation to the federal government, as did the states which relinquished certain rights and prerogatives. Nebraska possesses only such rights as were conferred upon her. At the time she became a state, the fifth amendment had long been a part of the constitution, and the supreme law of the land. The thirteenth section of the enabling act, creating Nebraska a state, provided, among other things, "that the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere in the United States," and that provision of the fifth amendment, which we invoke in behalf of human life, was as much a guaranty to the accused for

the protection of his life, as that provision of the constitution which makes sacred contract obligations, and secures them against the invasion of legislative or judicial power.

Whatever may have been held to be the rule as to those states admitted into or constituting the Union prior to the adoption of the fifth amendment to the federal constitution previous to the time of enacting the judiciary act of 1867, there can be no question that as to those admitted after its adoption it was a part of the supreme law and occupied the same relation to Nebraska and her citizens that the original constitution did to the states and citizens thereof which originally comprised the Union.

Not only by the federal constitution itself, and the act which enabled Nebraska to become a state, did this amendment become part of that state's organic law, but the people of the commonwealth in creating their state constitution adopted the language of the fifth amendment and provided that "no person shall be twice put in jeopardy for the same offense."

Article 12, Bill of Rights, Constitution of Nebraska.

The history of the judiciary act of 1867 is significant, and throws a strong light upon the question involved herein. The published proceedings of the two houses of congress show that the bill which subsequently became a law was reported by a committee which had been instructed "to inquire and report what legislation was necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of congress of March 3d, 1865, *and the liberty of all persons under the operation of the constitutional amendment abolishing slavery.*"

Cong. Globe, first session 39th Congress, part 5, page 4151.

The effect of this bill was declared by the member of the house of

representatives who reported it from the committee to be "to enlarge the privilege of the writ of *habeas corpus* and make the jurisdiction of the courts and judges of the United States co-extensive with all the powers that can be conferred upon them. It is a bill of the largest liberty."

Cong. Globe, first session 39th Congress, part 5, page 4151.

In the senate an inquiry was made "whether the second section was drawn *on the same principle* as the twenty-fifth section of the judiciary act of 1789." The reply was, "It is a little broader than the judiciary act. It is of a similar character."

Ib, page 4229.

In discussing this act this court say: "The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment."

Stewart v. Kahn, 11 Wall., 504.

Viewed in this or any other proper light, it is impossible to see how this law can afford relief under the provisions of the thirteenth amendment and deny it to a claim under another amendment equally as general in its provisions. Prior to the passage of the act of 1867, this court had held that decisions by state courts regarding matters affected by the amendments to the constitution were not properly matters for review in this court. Congress desiring to give this court the right to review such questions, passed that act which is broad in its character and general in its declarations. There is nothing in it which requires or will warrant a narrow construction. It must necessarily have been the intention of congress to confer upon this court general powers of review as in the act set forth.

Under the view of the law hereinbefore presented, the decisions

cited by counsel for the state of Nebraska are nowise in point. All the cases cited by the defendant in error rely upon the early case of Barron v. Mayor, etc., 7 Peters, 243. This case turned upon the question of the right of the city of Baltimore, in the exercise of its corporate authority over the harbor, the pavement, and grading of streets, and the health of the city, to divert certain streams of water from their natural channels. This case was decided in 1833, long before the passage of the judiciary act of 1867 or the adoption of the fourteenth amendment. Had that act been in existence at that time I have no doubt the exposition of the constitution given by congress in that act would have guided this court to a different conclusion than the one arrived at. In the case of Twitchell v. Commonwealth, decided in 1868, this court say: "We are by no means prepared to say that, if it were an open question whether the fifth and sixth amendments of the constitution apply to the state governments, it would not be our duty to allow the writ applied for, and hear argument on the question of repugnancy. We think, indeed, that it would."

Twitchell v. Com., 7 Wall., 325.

We think the fourteenth amendment and the act of 1867 makes this an open question. It was passed for the express purpose of enlarging this court's jurisdiction, so as to protect rights established by the constitutional amendments. It is true that this decision was rendered in 1868, but, as was said in Murdock v. Memphis, "apparently it happened that the fact that congress had passed the act of 1867 was hardly noted for some time within the precincts of this bar—where the venerable judiciary act of 1789 was in some sort regarded as only less sacred than the constitution, and most unlikely to be wished to be altered—and that the less studious observers considered that the new section was but a careless transcript of the old one. However, the more careful readers were early awakened by possibilities of meanings in the second section of the new act which would have far-reach-

ing effects. Mr. Phillips, in his work on practice in this court, early observed that the new act, 'in some of its provisions and omissions, seems to have been intended to work a change in the exercise of the jurisdiction of the court.'"

Phillips' Practice, page 128.
20 Wallace, 894.

The case of Fox v. Ohio, decided in 1847, and relied upon by the defendant in error, is one in which arose the question of two punishments for the same offense; and this court expressly held that the facts shown constituted two distinct offenses, each of which were punishable, one by the state, the other by the federal government. In that case this court say: "It is almost certain that in the benignant spirit in which the institutions both of the state and federal systems are administered an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity or where the public safety demanded extraordinary rigor."

In the case at bar the "benignant spirit" has not proved sufficient to secure our constitutional and natural rights, hence the appeal to this court.

The supreme court of Pennsylvania have recently had the exact question herein presented before them, and in a capital case decide that the fifth amendment gave the accused immunity, and went so far as to discharge him. They quote the amendment, and base their decision upon it.

Hilands v. Commonwealth, 111 Penn. St., 1. (Decided in 1886.)

IV.

The remaining question is: Has this man been twice in jeopardy?

There can be but little question that a conviction of one degree of an offense, upon an indictment, is an acquittal of all higher degrees of offense of which the offender could been convicted under said indictment.

Say the supreme court of Virginia in a case decided in 1877: "Where there is but one count in an indictment on which the accused may be convicted of one of several offenses, which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the offenses is a verdict of acquittal of all the others of a higher grade of offense. Thus on an indictment for murder, a verdict finding the accused guilty of manslaughter is a verdict of acquittal as to murder."

Stuart v. Commonwealth, 28 Gratt. (Va), 950.

Where under an indictment for murder the defendant could have been convicted of murder or manslaughter, his conviction of manslaughter bars a subsequent prosecution for the murder.

People v. Gilmore, 4 Cal., 376.
Slaughter v. The State, 6 Hump., 410.
Brennan v. People, 15 Ill., 511.
Barnett v. The People, 54 Ill., 325.
People v. Knapp, 26 Mich., 112.
State v. Tweedy, 11 Iowa, 350.
Hurt v. State, 25 Miss., 378.
State v. Martin, 30 Wis., 216.

Where the indictment covers two or more different offenses, or dif-

ferent grades of the same offense, a conviction on one count or of one degree acts as an acquittal of the others.

Campbell v. State, 9 Yerg., 333.
Dawson v. State, 65 Ind., 442.
Warnock v. The State, 6 Tex. Ap., 450.
State v. DeLaney, 28 La. An., 434.
Kirk v. Com., 9 Leigh, 627.
Bell v. State, 48 Ala., 685.
Stuart v. Com., 28 Gratt., 950.
Miller v. State, 58 Ga., 200.
Esmon v. State, 1 Sneed (Tenn.), 15.
People v. McGowan, 17 Wend., 388.
Morris v. State, 8 S. & M. (Miss.), 762.
Guenther v. The People, 24 N. Y., 100.
Weinforpflin v. State, 7 Blackf., 186.

And by the same reasoning, a conviction of murder in the second degree is an acquittal of murder in the first degree.

Jones v. State, 13 Texas, 184.
Campbell v. State, 9 Yerg., 334.
People v. Gilmore, 4 Calf., 376.
Com. v. Herty, 109 Mass., 348.
Livingstone's Case, 14 Gratt., 592.
State v. Ross, 29 Mo., 32.
State v. Smith, 53 Mo., 139.
State v. Lessing, 16 Minn., 65.
Fields v. State, 52 Ala., 349.
State v. Bull, 27 Mo., 325.
Clem v. State, 42 Ind., 420.
State v. Belden, 33 Wis., 120.
Johnson v. State, 29 Ark., 31.

See also note, pages 317-[illegible], paragraph 465, Wharton Criminal Pleadings and Practice, 8th edition.

The application for a new trial and the granting of the same does not destroy this privilege and protection. It is a right which is secure.

Says Cooley's Constitutional Limitations, page 402, section 328, edition of 1883:

"If a prisoner is acquitted on some of the counts in an indictment, and convicted on others, and a new trial is granted on his motion, he can be put upon trial the second time only on those counts on which he was before convicted, and is forever discharged from the others." Citing:

Campbell v. State, 9 Yerg., 333.
State v. Kettle, 2 Tyler, 475.
Morris v. State, 1 Swan, 14.
Barrett v. People, 54 Ill., 331.
Guenther v. People, 24 N. Y., 100.
State v. Kattleman, 35 Mo., 39.
State v. Martin, 30 Wis., 216.
S. C. Am. Rep., 576.
United States v. Davenport, Deady, 264.
S. C. 1 Green, C. R., 429.
Stuart v. Commonwealth, 28 Gratt., 950.
Johnson v. State, 29 Ark., 31.
State v. Byrd, 31 La. An., 847.
State v. Dennison, 31 La. An., 847.
Dawson v. State, 65 Ind., 442.
Walker v. State, 61 Ala., 30.
Nutt v. State, 8 S. & M., 762.

Says Bishop in his treatise on Criminal Law:

"The waiving of constitutional right, implied in making an application for a new trial, is not construed to extend beyond the exact matter concerning which the relief is sought. If, therefore, the verdict finds a prisoner guilty of part of the charges against him, and not guilty of another part, as, for example, guilty on one count of the indictment and not guilty on another count, or there being but one count, guilty of manslaughter, and not guilty of murder, and a new trial is granted him, he cannot be convicted on the second trial of the matter of which he was acquitted on the first."

Bishop on Criminal Law, Vol. 1, § 676, second edition.

Says Wharton in his treatise on Criminal Law: "Where, after conviction of manslaughter, a new trial is granted on the prisoner's application, it is held in Tennessee, in California, in Georgia, in Illinois, in Iowa, in Missouri, in Wisconsin, and Mississippi, that on the second trial he is discharged from the charge of murder, but such has not been the uniform understanding in practice. Of this a striking illustration is given in the address of Judge Grier to prisoners who applied for a new trial after having been convicted of manslaughter in the circuit court in Philadelphia, in 1848. * * * This point, however, did not arise in argument, and the view of Judge Grier conflicts not only with the cases just cited, but with those in which it is held that where a prisoner has once been convicted of murder in the second degree, he cannot, if he obtains a new trial, be convicted of of murder in the first degree. * * * The true view, however, is, that when the major and minor offenses are together before the jury, the defendant's conviction of the minor offense is an acquittal of the major, and is a bar to the further prosecution for the major." Wharton on Criminal Law, Vol. 1, 556. Citing:

Slaughter v. State, 6 Hump., 410.
People v. Gilmore, 4 Cal., 376.
Jordan v. State, 21 Ga., 545.
Breman v. People, 15 Ill., 511.
Barnett v. People, 54 Ill., 325.
State v. Tweedy, 11 Iowa, 350.
State v. Ball, 6 Jones (Mo.), 324.
State v. Ross, 29 Mo., 32.
State v. Martin, 30 Wis., 216.
Hurt v. State, 25 Miss., 378.
Jones v. State, 13 Texas, 168.
Lithgow v. Com., 2 Va. Cas., 297.

See also:

State v. Lessing, 16 Minn., 75.
Major v. State, 4 Sneed, 597.
State v. Hornsby, 5 Louisa., 558.
2 Virg. Cases., 311.
State v. Kittle, 2 Tyler, 472.
Campbell v. State, 9 Yerger, 333.
Esmon v. State, 1 Swan (Tenn.), 14.
State v. Ball, 27 Mo., 324.
United States v. Keen, 1 McLean, 439.

In discussing this question, the supreme court of Wisconsin say, in the case of the State v. Martin, 30 Wis., 216:

"The defendant having once been tried upon the indictment in this cause, and having been found not guilty of murder, but guilty of manslaughter in the second degree, was it competent to try him again upon the same indictment and convict him of murder in the first degree—the new trial having been granted upon his motion as above stated? We are of the opinion that this question, both on principle

and authority, must be answered in the negative. * * * * * * A person already convicted may waive the constitutional protection against a second prosecution, and ask for a new trial to relieve himself from the jeopardy which he is in. And when he does so, what ought to be considered the extent of his application? Is it to expose himself to the possible conviction of a charge of which he has been acquitted, or is it to relieve himself of the one of which he has been convicted? It would seem that a bare statement of the proposition was sufficient to furnish the proper answer. It is not in accordance with the principles of human conduct for a person to ask a further trial of a charge of which he has already been found guiltless by a verdict of a jury. But he seeks deliverance from one of which he has been convicted, and hence he asks that he may again be put upon trial for this charge. In this case the defendant was expressly acquitted of the charge of murder upon the first trial, and convicted of a lower crime. He asked for and obtained a new trial. A trial of what? Of the charge of which he had been convicted, or the one of which he had been acquitted? Is it reasonable to suppose that the defendant asked for another trial in order to determine whether he had comitted the crime of murder, or was it merely to determine whether he was guilty of manslaughter in the second degree, of which he stood convicted? The answer would seem to be plain upon the principle that it was the latter charge alone that he asked to have re-tried, and that his application for a new trial should be held to apply to this and not to the higher crime of which he was acquitted. And this is in accordance with the great weight of judicial opinion on this subject."

The State v. Martin, 30 Wis., 216.

The case is cited and the doctrine approved in State v. Belden, 33 Wis., 120.

The supreme court of Iowa say: "When the prisoner moved for a new trial, and appealed to this court, he sought to be relieved of a judg-

ment against him of manslaughter. He had no complaint to make that the jury had not convicted him of the offense of murder. If, however, he might properly be subjected to a second trial for murder, then he is compelled to submit to a verdict which he may deem ever so erroneous, lest by disturbing it when insisting on his legal rights, he may place himself again in jeopardy. When a jury has once returned a verdict of guilty as to the lower offense, the prisoner should not, in our opinion, be placed in a position of additional hazard by attempting to be relieved of the erroneous judgment. It is settled upon authority, that if he obtain a new trial he may be tried for the offense of which he was convicted. It is a very different thing, however, when it is sought to try him for an offense of which he was not convicted, and which was not necessarily in the verdict of guilty."

"In answering the objection on the part of the prosecution, that a new trial should not be given the prisoner, because he could not (under the authority of the United States vs. Gilbert, 2 Sumner, 37) be again put in jeopardy, McLain, J., uses the following pointed argument: 'The prisoner is found guilty by the jury, and whether right or wrong, must stand convicted. He claims under the constitution a fair and impartial trial, and he shows gross prejudice against him by the jury, who have convicted him on testimony wholly insufficient; but he is answered that the constitution protects him from being put in jeopardy a second time for the same offense, and that a new trial would violate that provision. In other words the constitution guarantees the right of being hung, to protect him from the danger of a second trial. Whatever may be said theoretically of this constitutional protection, practically the subject of it can have no very strong reason to appreciate it.' United States vs. Keen, 1 McLean, 339. So in this case, the rule is not very humane, to say the least of it, which says to the prisoner, 'You must abide this verdict, however unjust or erroneous, or if you do not we will give you a new trial and re-try you for an offense of which the jury have acquitted you.'"

The State vs. Tweedy, 11 Iowa, 354.

The supreme court of Illinois say: "An indictment for murder embraces the charge of manslaughter. The lesser is included in the greater accusation. On such an indictment, the jury may find the prisoner guilty of manslaughter. And such a finding amounts to an acquittal of the charge of murder. The finding of the inferior is necessarily a discharge of the superior offense. Ryan was regularly put upon his trial on the indictment, and was found guilty of manslaughter. In contemplation of law, the jury rendered two verdicts as to him; one acquitting him of the murder of Story; the other convicting him of the manslaughter of Story. Hs was thus legally tried for the offense of murder and acquitted. It is perfectly clear that he could not again be put in jeopardy on the same charge, unless that acquittal was set aside at his instance. A verdict either of acquittal or conviction is a bar to a subsequent prosecution for the same offense, although no judgment has been entered upon it. It does not appear from the record that Ryan has ever waived the benefit of the verdict of acquittal. It is true that he united with the other prisoners in asking for a new trial, but that application as to him must be regarded as extending only to the charge upon which he was convicted. He had no occasion for another trial, except as to the charge of manslaughter. Being legally acquitted of the charge of murder, he surely did not desire that to be again investigated. It is not to be presumed that he would voluntarily place himself in peril upon a charge upon which he had already been tried and acquitted. Even if the court, upon his own motion, could open the whole case, the record does not show that such a power was either invoked or exercised. The application for a new trial did not necessarily relate to the charge upon which he was acquitted. It naturally referred to the charge on which he was convicted. Nor did the court, in terms, set aside the entire finding of the jury. It simply granted the prisoner a new trial. The order was no broader than the application. The were two distinct findings as to Ryan, and therefore there was not the least necessity for disturbing the one acquitting him of murder. The one might be set aside, and

the other allowed to stand. The verdict was not an entire thing, which would wholly stand or fall. This view gives full effect to the order of the court. There was still a charge upon which Ryan could be tried again. This view of the question is sustained by the adjudged cases. * * * * * * *"

"In the opinion of the court, Ryan was improperly tried a second time for the murder of Story. He had previously been tried for that offense and his innocence legally established. The verdict of acquittal remained in full force; and he could not again be put in jeopardy on the same charge without a violation of an express provision of the constitution."

Brennan et al. vs. The People, 15 Illinois, 517.

This case is cited and adhered to in the case of Barrett vs. The People, 54 Ill., 331.

This, then, is the language of the courts. The opinions quoted from are taken at random. They are not selected because of their exceptional strength. Strong as their language is, they are no exceptions to the rule, and all the cases cited will be found equally in point and as decisive of the question controverted as those from which quotations are made.

Under the decisions of the courts, under the bill of rights of the state of Nebraska, under the constitution of the Federal Government, under the great broad law of humanity, this plaintiff in error claims the right of life.

In its opinion in this case, the Nebraska court say: "It must be conceded that in point of numbers this decision seems to be against the weight of authority. But it is apparently founded upon reason, and upon the advanced idea of American jurisprudence." That the idea put into effect by this decision is purely American, and finds no

sanction in the judicial procedure of other nations cannot be denied. To consider it "advanced" must be dependent on whether one's ideas of progress go forward or backward. That the step taken by the Nebraska court was long ago adjudged a bad one, is shown by the fact that King Alfred, indignant at the abuse of the King's Bench, hanged forty-two justices in one year, and among others it is recorded that he "hanged Sherborne, because he judged Osgot to death for a fact of which he was acquitted before, against the same plantiff, which acquittance he tendered to own by oath, and because he would not own it by record Sherborne would not allow of the acquittal which he tendered him."

Memories of Westminister Hall, by Edward Foss, F. R. S., vol. 1. pp. 211-212.

The similarity of the cases suggests that it were well for the Nebraska court that it did not sit in the days or realm of the "Good King Alfred."

If in discussing this subject I should be found to speak with more confidence than may be thought becoming, I stand upon this apology, that I am unable to persuade myself that there is involved herein any question whatever.

My general reading and particular investigation induce me to take the liberty of asserting that if it is the law, that if a person already convicted asks for a new trial to relieve himself of the jeopardy he is in, his application is considered sufficient in extent to expose him to the possible conviction of a charge of which he has been acquitted, then it is not that sort of law which Hooker speaks of, when, with the splendid magnificence of eastern metaphor, he says, "Her seat is in the bosom of God, and her voice the harmony of the world." Such a chimera can never be fashioned into a judicial rule fit to be tolerated or calculated to endure. This court may, I know, erect it into a rule;

and if you do so, I shall in common with others do my best to respect it; but until you do so I am free to say that in my humble judgment, it must rise upon the ruins of many a principle of peculiar sanctity and venerable antiquity, which "the wing of time has not yet brushed away," and which I believe it will be your wisdom to preserve and perpetuate.

CHAS. O. WHEDON,
Attorney for Plaintiff in Error.

Counsel:
C. E. MAGOON,
O. P. MASON.

[redacted]

[redacted]

[redacted]

In the Supreme Court of United States.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

No. 838.

This is a Writ of Error to the Supreme Court of Nebraska.

The case was before this Court in April, 1886, on a motion to dismiss for want of jurisdiction. The motion was denied, the Court holding that "Bohanan set up specifically an immunity from a second trial for the same offense, by reason of Article V of the Amendments of the Constitution of the United States. This was denied him by the judgment of the Supreme Court of the State, and we have jurisdiction to review that decision. Upon a motion to dismiss, we cannot consider the merits of the question on which our jurisdiction depends, and no motion has been made to affirm."

Opinion delivered by Mr. Chief Justice Waite. See 118 U. S. Reports, Page 231

While the Defendant in Error was laboring under the impression that to give this Court jurisdiction, it was not sufficient that a Federal question was raised, but that the question

was necessary to a final determination of the merits of the case, we bow in humble submission to the decision of this Court on the motion to dismiss, but we beg leave to submit anew the same question.

That an inspection of the record in this case will disclose that the only Federal question presented is that raised on the Fifth Amendment to the Constitution of the United States, and the argument is limited by the stipulation on file to this one question. (Record, Page 1.)

The following is a brief statement of the facts of the case effecting this question:

In February, 1882, Bohanan was indicted by the Grand Jury of Lancaster county, Nebraska, for killing one Cook, (see Record, Page 4,) in said county. To the indictment Bohanan interposed a plea in abatement, asserting the illegality of the Grand Jury, presenting an issue of fact. The Judge of the District Court denied the accused the right to try the issue raised.

On the trial of the cause in the District Court, Bohanan was convicted of murder in the second degree and sentenced to imprisonment for life. (Record, Pages 8 and 9.) A motion for a new trial was filed by Bohanan and overruled. Bohanan filed his Petition in Error in the Supreme Court of the State, praying that said judgment and sentence might be set aside and a new trial granted. (Record, Page 5.) And the Supreme Court says:

> "For the error in denying the prisoner a trial of the issue, taken on his plea in abatement the judgment must be reversed. The verdict set aside."
>
> *Bohanan vs. the State, 15th Nebraska, 215.*

The venue was changed at Bohanan's request (Record, page 10) from Lancaster to Otoe County, in the same District, and on a second trial on the indictment (the plea in abatement be-

ing waived, Record, pages 9 and 10,) the jury of Otoe county found him guilty of murder in the first degree (Record, page 21) and he was by the Court sentenced to death. (Record, Page 25.)

I.

We contend that the Court has no jurisdiction to consider the merits of this case, only for the purpose of determining whether or not you will exercise jurisdiction.

II.

The decisions of this Court have been unanimous, that the Fifth Amendment to the United States Constitution does not extend to the States, but operates solely as a limitation on the exercise of power by the Federal government. Then under this rule the judgment brought up by the Writ of Error having been rendered by the Supreme Court of the State of Nebraska, against Bohanan, a citizen of said State, for the murder of a citizen of the same State, this tribunal can exercise no jurisdiction over it.

John Barron vs. Baltimore, 7th Peters, (32) U. S. Reports, Page 246.
Twitchell vs. Commonwealth, 7 Wall. U. S., 321.
Malinda Fox vs. Ohio, 46th U. S., pages 434 and 435.

This was the view taken by the Supreme Court of Nebraska. (See Record, Page 42.)

The opinion of Chief Justice Marshall in the 7th Peters, and Chief Justice Chase in 7th Wallace, is so decisive of this point that it seems unnecessary to say anything more on that subject.

In the case of Kring vs. Missouri, 107 U. S., 226, which came up on the right of a State to pass an *expost facto* law un-

der Sec. 10, Article 1, of the Constitution, Justice Miller in rendering the opinion, says:

> "It was one of the objections most seriously urged "against the new Constitution by those who opposed its "ratification by the States, that it contained no formal "Bill of Rights. And the State of Virginia accompanied "her ratification by the recommendation of an amend- "ment embodying such a bill. The feeling on this sub- "ject led to the adoption of the first ten amendments "to that instrument at one time, shortly after the Gov- "ernment was organized. *These are all designed to op- "erate as restraints on the general Government*, and most "of them for the protection of private rights of persons "and property."

Plaintiff in Error intimates that the act of 1867 so enlarges this Court's jurisdiction as to include the question at bar, but we respectfully submit, that if the Amendments were designed to limit the power of the general Government over the States, we doubt the authority of Congress to take away this right from the States, but such authority should come from as high a power as that which created it, an Amendment to the Constitution itself.

But the language used by Chase, C. J., in the 7th Wallace, was in 1868, since the 1867 act was passed, as well as that used by Justice Miller in Kring vs. Missouri. These eminent jurists would not overlook such an important question, and we are led to think that the main object in raising such a question was *time*.

III.

If the Court should determine to examine the question on its merits, then we respectfully submit that there was no such jeopardy as is contemplated by the Amendment; that the Supreme Court of Nebraska has only passed on the effect of granting a new trial, and we submit the uniform rule held in the various States in modern decisions to be:

"That a conviction of murder in the second degree at the first trial, and the verdict set aside and a new trial granted, at the Defendant's request, is no bar to his conviction of murder in the first degree.

State vs. Behimer, 20 Ohio State Rept., page 572.
People vs. Keefer, 65 California, page 232.
Commonwealth vs. Arnold, (Ky.) in the 6 Crim. Law Mag., Page 61. It will appear in 83 Ky. Report.
State vs. McCord, 8 Kansas, page 232.
Veach vs. State, 60 Indiana, page 291.
State vs. Miller, 35th Kansas, page 329.
2nd Story on the Constitution, 4th Ed., see 1787.
Cooley's Constitutional Limitations, see 327, 3rd Ed.
Field and Miller's Federal Practice, Page 235.

IV.

The Legislature, in dividing the crime of murder into two degrees, recognized the fact that some murders, comprehended within the same general definition, are of less aggravated character than others, and deserving of less punishment. It did not attempt to define anew the crime of murder, but only to draw certain lines of distinction, by reference to which the jury might determine in a particular case, whether the crime deserved the extreme penalty of the law, or a less severe punishment. The Plaintiff in Error *was not acquitted of murder* by the first verdict, if placed in the strongest terms.

The fact that a severer penalty is to be imposed by the verdict of jury finding a different character of circumstances or aggravation, than was found by the verdict of the jury on the

first trial, cannot change the effect of a previous conviction for the *same murder on the same indictment*, where the Defendant, on his own motion, secures a new trial.

See cases above cited.

The Supreme Court of Nebraska in passing upon the question on the first trial says:

"For the error in denying the prisoner a trial of the issue taken on his plea in abatement, the judgment must be reversed, the verdict set aside."

See Bohanan vs. the State, 15 Nebraska, page 215.

The Court will observe that the error affected the whole subsequent proceedings, from the filing of the plea in abatement, the empaneling of the jury, the returning of the verdict, and sentence of the Court. How then can a jury that was declared by the Court to have been invalid from its inception, render a verdict that is half good and half bad? It seems absurd to say that the verdict of an invalid jury *is good*, so far as it *acquits* a Defendant, and is *void* so far as it *convicts him.*

And we believe the rule to be, that where an indictment is founded upon a murder or a single transaction containing different degrees, the verdict is a unit, and lays the foundation for but a single judgment, and a verdict upon one of the degrees, when set aside and a new trial granted, on the Defendant's own motion, opens up the case for a retrial, upon the whole indictment.

Leslie vs. State, 18 Ohio State Report, page 395.
Jarvis vs. State, 19 Ohio State Report, page 585.
State vs. Prescott, 7 New Hampshire, page 287.
State vs. Blaisdell, 59 New Hampshire, page 328.
State vs. Stanton, 1 Iredell, (N. C.,) page 427.

State vs. Morris, 1 Blackford, (Ind.,) page 37.
People vs. Gardiner (July 1, 1886, Mich.,) 29 N. W. Rep., 19.
Com. vs. McCormick, 130 Mass., 61.
State vs. Parker, 66 Iowa, 588.

And we respectfully submit the questions to this Court on printed briefs and arguments, and ask that the Court refuse to take jurisdiction on the merits of the case and dismiss the Writ of Error; or, if the Court does examine into the merits, that the judgment of the Supreme Court of Nebraska may be in all things affirmed.

WM. LEESE,
Attorney General
For Nebraska.

[redacted]

[redacted]

[redacted]

QUIN HOFFMAN

[redacted]

vs.

THE STATE OF NEBRASKA

[redacted]

IN THE SUPREME COURT

OF

THE UNITED STATES.

QUIN BOHANAN,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

Oct. 1887, Term. No. 501.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR.

I.

The affidavit of D. W. McCallum, sheriff of Otoe county, Nebraska, shows to this Court that since the writ of error in this case has been allowed, that the Plaintiff in Error has escaped from the custody of the State authorities, and that he is now at large and his whereabouts is unknown at this time.

It is a well settled rule that an escaped convict cannot suc-

cessfully maintain an appeal, and this rule prevails in over one half of the States in the Union, as well as in this Court.

McGowan vs. The People, 104 Ills., p. 100.
People vs. Redinger, 55 California, p. 290.
Commonwealth vs. Andrews, 97 Mass., p. 543.
People vs. Genet, 59 New York, p. 80.
Wilson vs. Commonwealth, 10 Bush. (Ky.) p. 526.
9th Criminal Law Magazine, page 439.

Some of the States differ as to the mode of procedure, but all Courts agree that it is no abuse of judicial discretion to refuse to hear a criminal case on a writ of error where the Plaintiff in Error has escaped and is not within the control of the Court below, either actually or constructively.

The language of Chief Justice Waite in the case of Smith vs. United States, 94th U. S., page 97, is cited with approval in nearly all cases of this character since that case has been decided, viz:

"If we affirm the judgment, he is not likely to appear to "submit to his sentence. If we reverse it and order a new "trial, he will appear or not as he may consider most for his "interest. Under such circumstances we are not inclined to "hear and decide what may prove to be only a moot case."

See Sargeant vs. State, 96 Indiana, p. 63.

WM. LEESE, Attorney-General,
For Defendant in Error.

LINCOLN, NEB., Sept. 3rd, 1887.

Received a copy of the within affidavit and authorities in support thereof.

O. P. MASON,
Att'y. for Plaintiff in Error.

Affidavit of D. W. McCallum, Sheriff.

State of Nebraska, } ss.
Otoe County. }

D. W. McCallum, being first duly sworn deposes and says: That he is now and has been, since the 7th day of January, A. D. 1886, the duly elected and qualified sheriff of Otoe county, Nebraska. That when he first came into his office of sheriff, one Quin Bohanan was confined in the jail of Otoe county on the charge of murder in the first degree. That said Bohanan was duly tried and convicted of said crime, and as in such cases made and provided, was sentenced to be hung on the 15th day of January, A. D. 1886.

That on December 22d, 1885, a writ of error was issued out of the Supreme Court of the United States, and ordered to operate as a supersedeas. That said case is known in last named Court, as Quin Bohanan, Plaintiff in Error, against the State of Nebraska, Defendant in Error, as is still pending in said Court undetermined.

That at all times, the affiant has had the custody of said Bohanan, as sheriff of said county, and kept him secure in the cell of the jail of Otoe county, Nebraska.

That on the —— day of July, A. D., 1887, and while the affiant had the custody of said prisoner, as aforesaid, he, the said Quin Bohanan, escaped from jail, and is at large as an escaped convict, and his whereabouts is unknown to your affiant, and the authorities of the State of Nebraska.

D. W. McCALLUM,
Sheriff of Otoe County.

Subscribed in my presence and sworn to before me this 22nd day of August, A. D. 1887.

[L. S.] Geo. D. Scofield, Notary Public.